The Central Law Journal.

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CURRENT TOPICS.

SENATOR BURKEHOLDER has introduced a bill in the state senate making an important amendment in the statutes of this state in regard to verdicts. It provides that "in every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict; [and in all such cases the court, at the request of the parties, or of either of them, shall direct the jury to find a special verdict in writing upon all or any of the issues in the case; and upon like request, instruct the jury, if they shall render a general verdict, to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon; the special verdict or finding shall be filed with the clerk and entered upon the records of the court; when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."] That portion in brackets comprises the amendment. It seems to us that this amendment would prove a very salutary check upon the ignorance and mistakes of juries in construing instructions. Where they find the facts, it can, in complicated cases, be more safely left to the court to apply the law to the facts, than to require them to apply the law as given them by the court. Juries often misapprehend the instructions given them, and sometimes wholly disregard them, and in a majority of cases the injured party is without remedy.

THE ELECTORAL COMMISSION completed by the selection of Mr. Justice Bradley as the fifth member from the Supreme Court, having been organized and having adopted rules of order and procedure, has had submitted to it, as being the first case where the returns have become the subject of dispute under the provisions of the bill, the electoral vote of the State of Florida. The distinguished character of the tribunal, and the gravity of the interests involved, are shown in the appearance before the commission of the ablest and most celebrated advocates which either of the political parties contains. The sitting of Monday was taken up with the arguments of Wm. M. Evarts and Charles O'Conor representing the republican and democratic side of the question, respectively. Mr. Evarts combated the theory of the democratic counsel, that the commission ought to receive evidence other than that which had been laid before the two houses of Congress by the presiding officer of the Senate, and which had been referred to the electoral commission. He charged that the democratic counsel wanted to introduce extraneous evidence to show every step taken in the election itself, but not to prove that Governor Stearns' action was not based on the returns as received by him from the regular count of the canvassing boards. Mr. Evarts then maintained that there was no law of Congress which provided for taking proof of any acts of electors, and that there was no other process of counting the vote, except that provided under the Constitution. By going behind the returns, as suggested in the case of Florida, he maintained that Congress would be exercising plenary judicial powers, which the Constitution of the United States does not confer upon that body. He said the proposition to interpose judicial inquiry into a purely political proceeding was a most novel one. Mr. O'Conor, in his argument, maintained that the commission had the right to make a full inquiry into the facts of the Florida election. He also declared that the Tilden electors had the best legal right to be recognized, and concluded by insisting that the commission receive as evidence the testimony taken by the Congressional committees. As we go to press we learn that the judgment of the commission has been announced, in which, by a vote of 8 to 7, it is decided not to go behind the certificates of the governor of the State, or to hear testimony except on the point of the ineligibility of electors.

IF MR. CHIEF JUSTICE WAITE keeps on writing those crisp and terse opinions which have characterized him since he has been on the bench of the Supreme Court of the United States, we think we shall be able to publish in full one or two each week, under the head of "Current Topics." The following is his opinion in the case of the Western Union Telegraph Company v. Rogers, delivered at the present term. It will be seen that nothing whatever is needed to give it fullness or symmetry: "Before the act of February 16th, 1875 (18 St. 316), increasing the sum or value of the matter in dispute, necessary to give this court jurisdiction, from two to five thousand dollars after May 1, 1875, it was held that we had no jurisdiction in cases where the matter in dispute was two thousand dollars and no more, and that, in determining the jurisdictional amount, 'neither interest on the judgment nor costs of suit can enter into the computation." Walker v. U. S., 4 Wall. 164; Knapp v. Banks, 2 How. 73. The act of 1875 simply increases the jurisdictional amount. No other change is made in the old law. The judgment in this case was rendered May 8th, 1875, for five thousand dollars and no more, except costs. It follows that, according to the practice established under the old law, this writ must be dismissed for want of jurisdiction."

The following, also, is his opinion in the case of Meyer *et al.* v. Pritchard, lately delivered: "In Moffitt v. Garr, 1 Black, 282, we held that a surrender of a patent 'means an act which, in the judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right, after the surrender, than could an act of Congress which has been repealed. * * * The re-issue of the patent has no connection with or bearing upon antecedent suits; it has, as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and, unless it exists and is in force at the time of trial and judgment, the suits fail.' To the same effect is Reedy v. Scott, 23 Wall. 364. We are satisfied with this ruling. Since the appeal in this case, the appellants, who represent the original patentees, have surrendered the patent upon which the suit was brought, and obtained a re-issue. This fact is conceded. If we should hear the case and reverse the decree below, we could not decree affirmative relief to the appellants, who were the complainants below, because the patent upon which their rights depend has been canceled. There is no longer any 'real or substantial controversy between those who appear as parties to the suit' upon the issues which have been joined, and for that reason the appeal is dismissed, upon the authority of Cleveland v. Chamberlain, 1 Black, 426, and Lord v. Veazie, 8 How. 255. The cause is remanded to the circuit court, to be dealt with as law and justice may require."

THE equity rules established by the Supreme Court of the United States certainly need revision in respect to the compensation allowed masters in chancery for making sales. As it is now, under the 82d rule, the fees of masters in chancery of the United States Circuit Courts, for making sales, stand on the same footing as their fees for other services, that is to say, they rest in the discretion of the court. This discretion appears to be a floating and variable discretion, without anything to guide it. Thus, in the late foreclosure sale of the Northern Pacific Railroad, which took place in the United States Circuit Court for the Southern District of New York, the property was bid in by the bondholders at the nominal sum of one hundred thousand dollars; but the master in chancery and the marshal, denominated a master-commissioner, received for making the sale, exclusive of expenses, the sum of twenty-five thousand dollars; while in a case where a railroad was sold by the United States Circuit Court for the District of Iowa, by a special master, and was bid in by the bondholders at the nominal sum of twelve hundred thousand dollars, the master received for his services but eight hundred dollars.

We have learned with surprise, that in those circuits where no rule upon the subject has been established, a practice has sprung up of making bargains in advance with the officers appointed to perform such services, as to the amount of their compensation. We certainly hope that the Supreme Court will, by the promulgation of a definite rule, put a stop to this practice. This is aptly illustrated by the case of Gilman v. The Des Moines Valley, etc., R. Co., 40 Iowa, 200, which was a suit to foreclose a mortgage on a railroad. In this case, under the threat of bringing the suit in another county, the sheriff of the county in which the suit was brought, was induced to sign an agreement to charge only two hundred and fifty dollars for making the sale. After making the sale, he repudiated the agreement and insisted on his commission under the statute, which amounted to some fifty-nine hundred dollars. In this he was sustained by the Supreme Court, the court holding that the agreement was void, first, because it was against public policy, and secondly, because it was without consideration.

Practices not differing in spirit from this are strongly denounced in England, and, we presume, in every American state, by statutes against buying and selling offices. In Tappan v. Brown, 9 Wend. 175, a deputy inspector of flour, who was entitled by law to a certain commission, agreed with his principal to take, in lieu of his statutory fees, a fixed salary. This was held to be a corrupt agreement, and within the prohibition of the statute against selling any office or deputation of office. In Georgia a clerk farmed out his office to his deputy, the deputy to pay him a sum certain therefor. It was held, under the statute 5 and 6 Edw. 6, ch. 16, §§ 2, 3, in force in Georgia, that the agreement was void. And the English courts have so held. Godolphin v. Tudor, 2 Salk. 468; Greville v. Attkins, 9 B. & C. 462. Similar rulings will be found in this country, in the cases of Smith v. Whildin, 10 Pa. St. 39; Warner v. Grace, 14 Minn. 487; Lewis v. Knox, 2 Bibb. 454; Outon v. Rodes, 3 Marsh. 433; Gray v. Hook, 4 Comst. 449; Dodge v. Stiles, 26 Conn. 463; Hatch v. Mann, 15 Wend. 45; Hall v. Gavitt, 18 Ind. 390.

POSSESSION OF REAL ESTATE AS NOTICE OF ADVERSE TITLE.

Both in this country and in England the doctrine seems quite firmly established, that open, notorious, unequivocal and exclusive possession of real estate, under an apparent claim of ownership, is notice to the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature. In general, the possession upon which such claimants rely, is held under, and pursuant to an unrecorded deed or an executed parol contract. The application of this doctrine has been somewhat modified, particularly as applied to unrecorded instruments, by the recording acts of the several States.

In Missouri, where the statute provides in relation to conveyances of real estate, that "no such

instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record," (Wag. Stat. 227, § 26), the supreme court, in sustaining the doctrine of notice by possession, have not placed it on the ground of *constructive* notice, for the reason that the statute required *actual* notice. In Beatie v. Butler, 21 Mo., 313, Scott, J., in delivering the opinion of the court, thus expresses himself: "The fact that another is in possession, when known to a purchaser, may be submitted to a jury in connection with other circumstances, to show that he had actual notice of an adverse title. But the mere fact itself, with nothing more, can not, as we conceive, tend in the least to a conviction that there was any notice such as is required by statute. Actual notice does not require positive and certain knowledge, such as seeing the deed; but that is sufficient notice, if it be such as men usually act on in the ordinary affairs of life." Ryland, J., concurs in the judgment, but not in what is said of notice by possession; the other judge (Leonard) not sitting. The subsequent case of Vaughan v. Tracy (22 Mo. 415), was heard before a full bench, composed of the same judges. Leonard, J., in delivering the opinion of the court reversing the judgment of the court below, because of an instruction to the effect that, as matter of law, possession was actual notice, declared his individual opinion to be, that "the fact of possession might be presumed to have been within the purchaser's knowledge; and if knowledge is brought home to the purchaser, that a third person is in the possession and apparent ownership of the land, it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee, under a title derived from a former owner." Ryland, J., concurs, not only in the judgment, but in that part of the opinion relating to notice by possession, and Judge Scott refers to the case of Beatie v. Butler, as expressing his views. The case of Vaughan v. Tracy was again before the supreme court, in 25 Mo. 318, and was again reversed for substantially the same error as before, and the same views are expressed by the court, without dissent, in regard to the question under consideration. The difference of opinion between the learned judges, who considered these cases, seems to be in regard to the weight to which the fact of possession, (which they agreed should be submitted to the jury), was entitled as evidence of actual notice of ownership. One view being that it was entitled to no consideration at all, and the other that, under ordinary circumstances, the knowledge of such possession amounted to sufficient information to the second purchaser, that the possessor was the owner. If the latter of these views be correct, it would seem that the only question for the jury in such a case would be, whether the subsequent purchaser had knowledge of such possession, or, from the circumstances, such knowledge could be presumed.

This question seems to lie in the neighborhood of that shadowy line which separates constructive notice from actual notice established by presumptive evidence. According to the definition of actual notice, as laid down by Wagner, J., in Speck v. Riggin, 40 Mo. 405, such possession would create such a strong presumption of notice that the subsequent purchaser would not be permitted to deny the knowledge imputed to him. Says the learned judge: "Notice may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim, *or is conscious of having the means of knowledge, although he may not use them.* In Maupin v. Emmons, 47 Mo. 304, it is held sufficient evidence of notice of an unrecorded deed, if the jury may infer from it either full knowledge or voluntary ignorance on the part of the purchasers. The fact that one other than the vendor is in possession of real estate, when brought to the knowledge of a purchaser, would certainly place at his disposal the means of ascertaining by what right such possessor held. He could not fail to be conscious of having such means of knowledge in his possession. To fail to use them, would be "voluntary ignorance." Nor is it at all certain, that in cases where it is admitted that possession is open, notorious, and exclusive, it would be necessary to submit to the jury even the question of knowledge of the possession. The actual notice upon which the occupying claimant relies, might be established without it. It is incumbent upon a purchaser to inquire. Inquiry would inevitably lead to knowledge of a fact which is notorious. The fact of possession being ascertained by the purchaser, he is bound to pursue his inquiry until he ascertains the nature of the possessor's claim. Having these means of knowledge at his command, and failing to use them, the law treats him precisely as though he had used them and learned all that might have been ascertained upon inquiry. McLaughlin v. Shepherd, 32 Me. 143; Handy v. Summers, 10 Gill & Johnson, 316; Wickes v. Lake *et al*, 25 Wis. 71; McCulloch v. Cowhen, 5 W. & S. 427; Woods v. Farmere, 7 Watts, 305; Bailey v. White, 13 Tex. 114; Baynard v. Norris, 5 Gill. 538; Davis v. Hopkins, 15 Ills. 519; Bailey v. Richardson, 15 Eng. L. & E., 218; Lea v. Polk Co. Copper Co. 21 How. 493; Hughes v. U. S., 14 Wall. 232; Shumate v. Reavis, 49 Mo. 333. In the absence of statutes requiring actual notice, the courts have inclined to regard possession as constructive notice, and in the following cases it is held not to be subject to rebuttal or denial: Chesterman v. Gardener, 5 Johns. Ch. 29; Governor v. Lynch, 2 Paige, 300; Grimestone v. Carter, 3 *Id.* 421; Krider v. Lafferty, 1 Wharton, 304; Lightner v. Mooney, 10 Watts. 412; Sailor v. Hertzog, 4 Wharton, 259; Kerr v. Day, 2 Harris, 112; Knox v. Thompson, 1 Little, 350; Morton v. Robards, 4 Dana, 258; Buck v. Holloway, 2 J. J. Marshall, 178; Hackwith v. Dameron, 1 Monr. 235; Macon v. Sheppard, 2 Humph. 335; Burt v. Cassity, 12 Ala. 734; Dixon v. Doe, 1 Smeedes. & Marshall, 70; Wilty v. Hightower, 6 *Id.* 245; Brice v. Brice, 5

Barb. 535; Johnson v. Glancy, 4 Blackf. 94; Webster v. Madox, 6 Me. 256; McLaughlin v. Shepherd, 32 *Id.* 143; Jenkins v. Bradley, Sneedes & Marshall, Ch. 338; Tuttle v. Jackson, 6 Wend. 213; Parks v. Jackson, 11 *Id.* 442; Matthews v. Demeritt, 22 Me. 312.

There are numerous cases, in which, however, it is treated as constructive notice, which may be explained away or rebutted by direct testimony, or by countervailing circumstances. Williams v. Brown, 15 N. Y. 354; Cunningham v. Buckingham, 1 O. 264; Harris v. Arnold, 1 R. I. 125; Flagg v. Mann, 2 Sumner, 556; Rogers v. Jones, 8 N. H. 264; McMechan v. Griffing, 3 Pick. 154; Hewes v. Wisnell, 8 Me. 94; Rupert v. Mark, 15 Ills. 540. The weight of authority, in the absence of statutory provisions to the contrary, would seem to be on the side of considering the constructive notice, as not subject to rebuttal or denial, except where the purchaser had made diligent inquiry of the possessor. It seems quite clear, both upon authority and principle, that, in order that possession may operate as notice or even evidence of notice, the title and the possession under it must be contemporaneous with the purchase. The grantee will not be affected with notice of what occurs after his purchase, nor of antecedent possession, where the real estate is unoccupied at the time of his purchase. Rupert v. Mark, 15 Ill. 540; Lightner v. Murray, 10 Watts. 407; Ehle v. Brown, 31 Wis. 405; Boggs v. Varner, 6 W. & S. 469-74; Campbell v. Brackenridge, 8 Blackf. 471.

Where the record shows the title in the occupant, his possession will be referred to his record title, in preference to any other, and a purchaser will not be charged with notice of an unrecorded title, or equitable claim under which the possessor pretends to hold. As where the mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not be bound by notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase. Plumer v. Robertson, 6 S. & R. 184; Woods v. Farmere, *supra*.

The authorities are conflicting in this country, as to whether the possession of a tenant is notice of the unrecorded title of his landlord. The English cases confine the effect of possession to the title of the party actually in possession. The tenant's possession is simply notice of his tenancy, and not of his landlord's title. Barnhart v. Greenshields, 28 Eng. L. & Eq. 77; Sug. on Vendors, vol. 3, § 231-2, and cases cited. Many of the American authorities decide the question in the same way, and in the cases where it is so decided, the circumstances of each particular case seem to warrant this view of the law: Beatie v. Butler, 21 Mo. 313; Flagg v. Mann, 2 Sumner, 557. But in Sailor v. Hertzog, 4 Whart. 259, Hood v. Fahnestock, 1 Barr, 470, Kerr v. Day, 14 Penn. 112, Wright v. Wood, 23 *Id.* 120, Wickes v. Lake, 25 Wis. 71, the contrary doctrine is held apparently with equally good reason. Of course inquiry of the tenant in possession would elicit information as to who the landlord was, and in that way would inform the purchaser that some one else claimed to own the land. But should his diligence be unproductive of information concerning the title, further than that of the occupant of the premises, the effect of his possession as notice to purchasers would end with him, and any unrecorded or parol conveyance would be unavailing in behalf of a landlord of the tenant.

The possessor of real estate may be estopped from relying upon his possession as notice of title, by putting upon record a conveyance inconsistent with title in himself. Scott v. Gallagher, 14 S. & R. 333; Woods v. Farmere, 7 Watts. 382; Newhall v. Pierce, 5 Pick. 450; N. Y. Life Ins. Co. v. Cutler, 3 Sanf. Ch., 176. But in Randall v. Silverthorn, 4 Barr, 173, occupation of an easement in the premises, after the conveyance of the fee, is evidence of a parol reservation; and in Webster v. Madox, 6 Me. 256, Kent v. Plumer, 7 *Id.* 464, it was held that continued possession by the grantor was sufficient evidence of a re-conveyance by the grantee, although both conveyances were part of the same transaction, and the deed of the grantor was recorded though the re-conveyance was not. This extension of the rule may justly be regarded as very unsafe to follow, and when to meet a bad case it is so extended, there would be danger that it might come back to plague the court in the future. It is not believed that the continued possession of the grantor would be regarded as notice to purchasers, of a re-conveyance, outside of the states where it has already been so decided.

It should be borne in mind that, to have the effect of notice, the possession should be exclusive, (Buckmaster v. Needham, 22 Vt. 617; Kendall v. Lawrence, 22 Pick. 540), unequivocal and easily distinguished from that of the grantor. Bellington v. Welch, 5 Binney, 129; Hanrick v. Thompson, 9 Ala. 409; Holmes v. Stuart, 3 Green, Ch. 492; Kendall v. Lawrence, *supra*; McMechan v. Griffing, *supra*. When the possession is that of a tenant in common, it would not operate as notice of an unrecorded or parol conveyance from his cotenant. And where the possession appears to be in conjunction with the grantor, and the limits to the portion occupied by each are undefined, it will, in general, be regarded as a tenancy under the grantor, in the absence of distinct information to the contrary.

W.

ANOTHER story of the late Senator Nye is going the rounds of the papers: It is related that he was trying a case in the southern tier, the presiding judge being peevish and irritable, as well as rather dull. Gen. Nye had not only cross-examined the witness at great length, but had frequently put the same questions, which the judge had frequently ruled against as improper. At last the patience of the judge was exhausted, and he rebuked Gen. Nye, and petulantly asked him: "Gen. Nye, what do you think I am sitting here for?" Nye looked up at the bench, and, with a grave countenance, but a twinkle in his eye, answered coolly and composedly, "You have got me this time, your Honor!"

JURISDICTION OF UNITED STATES COURTS —ACT OF MARCH 3, 1875.

SECKEL v. BACKHAUS *ET AL.*

United States Circuit Court, Eastern District of Wisconsin, January, 1877.

Before HON. CHAS. E. DYER, District Judge.

Under the act of March 3, 1875, the United States Circuit Courts have jurisdiction to entertain a bill to foreclose a mortgage in behalf of a non-resident assignee of such mortgage, though the assignor could not, by reason of citizenship, have filed such bill.

The complainant filed a bill to foreclose a mortgage, of which he was the assignee. The bill alleged that the mortgage was given to secure certain notes executed by the mortgagor, which notes and mortgage were sold and transferred by the payees and mortgagees named therein, and by written assignment and delivery came to the hands of complainant. The bill was demurred to on the ground that the court had not jurisdiction of the subject-matter of the action.

Winfield Smith, for complainant; *E. Mariner*, for defendants.

DYER, J.:

By the demurrer to the bill the question is presented, whether this court has jurisdiction to entertain a suit in equity to foreclose a mortgage, prosecuted by a non-resident assignee in a case where the assignor is a citizen of the state and district in which the mortgagor resides and the action is brought. This question must be answered as we determine the construction to be given to the first section of the act of Congress of March 3d, 1875, relating to the jurisdiction of circuit courts of the United States. U. S. St. at L., vol. 18, part 3, p. 470. That act (section 1), after providing that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law *or in equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * in which there shall be a controversy between citizens of different states," declares that "no circuit or district court shall have cognizance of *any suit* founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, *except in cases of promissory notes negotiable by the law merchant and bills of exchange.*" Prior to the passage of this act, no suit at law upon a promissory note could be prosecuted in the federal court by the transferee or assignee of the note, in cases where the assignor, by reason of citizenship, could not have prosecuted such suit. By virtue of the enlarged jurisdiction conferred by the act, such an action may now be maintained by an assignee who is a citizen of another state, though it could not have been prosecuted by the assignor. Now, does the act give to the court jurisdiction to entertain a proceeding in equity in behalf of such assignee, to foreclose a mortgage given to secure promissory notes, in a case where the assignor could not, because of citizenship, have prosecuted such a suit?

In Osgood v. Chicago, Danville and Vincennes R. R. Co. *et al.*, 7 C. L. N. 240, the circuit judge of this circuit, in construing the act of March 3d, 1875, regarded it as the intention of Congress, by that act, to consolidate in one act all the previous general acts conferring jurisdiction upon the circuit courts, and at the same time to give the court jurisdiction in some cases where no previous act of Congress had conferred it. By the act, not only is jurisdiction extended, but the right is given to remove causes from state to federal courts in cases where removals were never before authorized. The language of the first section includes suits of a civil nature in equity, as well as at common law; and another section of the act contains new and ample provisions for acquiring jurisdiction of non-resident parties in suits for enforcement of equitable and other liens. Reference is made to these features of the act, as indicative of its spirit and general scope. A mortgage given to secure the payment of a promissory note is a mere incident to the note. It is extinguished by payment of the note. It passes with a transfer of the note. The debt is the principal thing, and the mortgage is collateral. No defense involving the validity of the debt can be set up against a mortgage in the hands of an assignee, which can not be set up against the debt itself. A mortgage is attached to the debt, and follows its destinies and ownership. It is beneficially assigned, transferred, released, surrendered, re-issued and revived, with the instrument evidencing the debt, and without any other forms or ceremonies than are requisite in case of the latter. Martineau v. McCollum *et al.*, 4 Chand. 153; Croft v. Bunster *et al.*, 9 Wis. 503; Blunt v. Walker *et al.*, 11 Wis. 334.

Although it was formerly held by the Supreme Court of the United States that, in a foreclosure decree, it could not be adjudged that the mortgagor pay a balance that might remain unsatisfied after exhausting the proceeds of the mortgaged premises [Noonan v. Lee, 2 Black, 500; Orchard v. Hughes, 1 Wall. 74], it is now provided by rule of that court that, in suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due over and above the proceeds of sale, and execution may issue for the collection of the same. 1 Wall. 5. In view of the relation which the mortgage bears to the debt, it may be accurately said that an action to foreclose the mortgage is founded upon the debt. It rests upon the principal contract, which is the note, and its object is the recovery of the debt by exhausting the security, which is the incident; and, as we have seen, the security being exhausted, the debtor may be pursued in the same proceeding by execution for any balance against his general property.

In Sheldon v. Sill, 8 How. 441, cited in the argument, the court say that a mortgage is but a special security, and that the remedy obtained on it in a court of equity is but the satisfaction of the debt. "It is the pursuit, by action, of one debt on two instruments or securities, the one general, the other special." The jurisdiction, invoked by bill to foreclose, is appealed to for recovery of the debt, the evidence of which lies in the principal contract, the note. The mortgage following the debt, the holder of the debt has the equitable right to the security, and can therefore foreclose. As the result of this view of the question, I hold that, under the act of 1875, this court has jurisdiction in a suit in equity to foreclose a mortgage given to secure a promissory note where the assignee and holder is a citizen of another state, and the maker a citizen of this state and an inhabitant of this district, though the assignor could not, by reason of citizenship, have brought the suit.

Demurrer overruled, with leave to answer.

THE oldest judge in England is the Right Hon. Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer Division of the High Court of Justice, aged eighty-one; the youngest is Sir Nathaniel Lindley, Justice of the Common Pleas Division, aged forty-nine. The oldest judge in Ireland is the Hon. James O'Brien, of the court of Queen's Bench, aged seventy-one; the youngest, the Right Hon. Christopher Palles, LL.D., Chief Baron of the Court of Exchequer, aged forty-six. The oldest of the Scotch Lords of Session is Robert Macfarlane, Lord Ormidale, aged seventy-five; the youngest, Alexander Burns Shand, Lord Shand, aged forty-eight.

POWERS OF RECEIVERS.

COWDREY v. GALVESTON, HOUSTON & HENDERSON RAILROAD.

Supreme Court of the United States, October Term, 1876.

1. AUTHORITY OF RECEIVERS TO INCUR EXPENSES.—A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, expenditures incurred by a receiver to defeat a proposed subsidy from a city to aid in the construction of a railroad parallel with the one in his hands, were disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.

2. THE EARNINGS OF A RAILROAD in the hands of a receiver are chargeable with the value of goods lost in transportation, and with damages done to property during his management.

3. CLAIM OF ATTORNEY FOR PROFESSIONAL SERVICES.—Where an attorney and counselor-at-law was employed by trustees of certain mortgaged property to foreclose the mortgages upon a stipulated retaining fee, and he entered upon such retainer and commenced the suit and prosecuted it until prevented by the outbreak of the civil war, and, after the termination of the war, offered to go on with the suit; but in the meantime, the trustees having died, a new suit was commenced and prosecuted without his assistance by the bondholders (for whose security the mortgages were executed), to foreclose the same mortgages, in which suit a receiver was appointed; *held*, that his claim for his fee was chargeable against the funds obtained by the receiver from the mortgaged property.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Mr. Justice FIELD delivered the opinion of the court:

In February, 1867, a suit was commenced in the Circuit Court of the United States for the Eastern District of Texas, for the foreclosure of certain mortgages, executed by the Galveston, Houston, and Henderson Railroad Company, a corporation created by the legislature of Texas, and the sale of the mortgaged property. The mortgages were adjudged valid by the court, and the sale of the mortgaged property was decreed. Subsequently, in 1869, by consent of the parties, Cowdrey, one of the complainants, was authorized to take the charge and management of the property and act as receiver of the court. He accordingly qualified, and for some years acted as such receiver, superintending the management of the road of the company until it was sold, and disposing, under direction of the court, of its earnings, and of the proceeds received when the sale was made. Reports of his proceedings were rendered from time to time to the court, and received its approval. His final report was filed in 1874, showing a balance of assets in his hands of $6,963.99, and the direction of the court as to its disposition was prayed. Exceptions to the allowance of the account being taken, the matter was referred to a master for his examination and report. The master refused to allow a credit for certain expenditures, incurred to defeat a subsidy from the city of Galveston, to aid the construction of a road parallel with the one in the hands of the receiver. These expenditures amounted to $14,029.15, and this sum being added to the amount of the assets admitted to be in his hands, the receiver was charged with $20,993.14.

The master allowed certain sums against the company for goods lost in transportation and damage done to property whilst the road was under the management of the receiver, amounting to $7,565. The master also allowed a claim of John C. Bullitt, Esquire, for professional services to the trustees in a previous attempt to foreclose the mortgages, the complete execution of which was prevented by the war. The claim was for $5,000; but the court, in its decree, reduced the amount to $2,500. The report of the master, modified as to this amount, was confirmed, and, by the decree of the court, the receiver was directed to pay the several amounts allowed, besides certain costs incurred, out of the proceeds in his hands, in preference to the balance due the complainants. From this decree the appeal is to this court.

The expenditures to defeat the subsidy proposed from the city of Galveston were properly disallowed. It was no part of the receiver's duty to interfere with the construction of a parallel line of railway, or to attempt to defeat any contemplated aid for such an enterprise. The proposed line may have been of great importance to the public and necessary to the prosperity of the city, though it might possibly diminish the future earnings of the company whose road was in his charge. At any rate, as an officer of the court, the receiver could not be allowed to determine the question of its importance, either to the public or the company, and, acting upon such determination, to appropriate funds in his custody to aid or defeat the measure, without sanctioning a principle which would open the door to all sorts of abuses. A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment.

The allowance for goods lost in transportation and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after the charges of this kind, as well as the expenses incurred in their behalf, were paid.

The claim of the intervenor, Mr. Bullitt, for his professional services as an attorney and counselor-at-law, was a meritorious one. He had been retained in 1860 by the trustees to foreclose the first and second mortgages embraced in this suit, and was promised by them a retaining fee of $5,000. Upon his engagement he went from Philadelphia, the place of his residence, to Galveston in the State of Texas, and there filed a bill in the Circuit Court of the United States, to foreclose the mortgages, one of which was for fifteen hundred thousand dollars, and the other for seven hundred and fifty thousand dollars. Process was issued and served and issue was taken in the suit by the demurrer to the bill. The further prosecution of the suit was prevented by the outbreak of the civil war, during which the records of the court were destroyed by fire, and the trustees died. Upon the close of the war the intervenor took steps to continue the suit, and while engaged in correspondence with the representatives of the trustees on the subject, the present suit was brought by Cowdrey and others, bondholders, without consultation with him and without his assistance. Under these circumstances there can be no reasonable doubt of the justice of the claim, or that it was properly allowed by the master. Of its subsequent reduction to one-half he does not complain, not having excepted to the decree in this particular or appealed from it to this court.

The fact that the retainer was by the trustees in the mortgages, who have since died, and the present suit was prosecuted by the bondholders, *the cestuis que trust*, does not affect the position of the claim. The trustees, had they lived, would have been entitled to

retain, out of the funds received by them, sufficient to meet the claim. They would have had an equitable right, not merely to be reimbursed from such funds all reasonable expenses incurred, but also to retain from the funds sufficient to meet all reasonable liability contracted in the execution of their trust. From the time of the employment of the intervenor the funds derived from the mortgaged property were chargeable with the liability consequent upon the retainer; and it matters not whether those funds were obtained by the trustees, or, in consequence of their death or of the action of the court, by other parties having charge of the property. DECREE AFFIRMED.

REMOVAL OF CAUSES.

CAPE GIRARDEAU AND STATE LINE R. R. v. WINSTON *ET AL.*

United States Circuit Court, Eastern District of Missouri, January, 1877.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. SAMUEL TREAT, District Judge.

1. PETITION FOR REMOVAL—TRUST DEED—NECESSARY PARTIES.—In a suit brought in a state court by the plaintiff corporation to set aside a deed of trust, made by its officers and another corporation of the same state, a removal of the cause to the United States Court was sought by the surviving trustee in the deed of trust and one of the bondholders under it. *Held* that, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed under the act of 1866 (Rev. Stat. sec. 698, clause 2), as to them.

2. EFFECT OF ACT OF 1875—CONSTITUTIONALITY OF ACT OF 1866.—Per Treat, J.: That part of the act of 1866 embraced in clause 2 of sec. 639, Rev. Stat., is repealed by the act of March 3, 1875, or if this be not so, these provisions of the act must be held to be unconstitutional.

MOTION to remand to the Cape Girardeau Circuit Court.

This cause was instituted in the Cape Girardeau Circuit Court, to declare a mortgage void, so far as the property of the Cape Girardeau and State Line R. R. is concerned, being a road-bed situate in the counties of Cape Girardeau, Bollinger and Stoddard, and to remove the cloud upon the title of said company occasioned by the mortgage. The petition substantially sets out that the president of the Cape Girardeau and State Line R. R., by authority of the directors of the company merely, without any authority therefor conferred either by the charter or the general laws of the state, and without being thereto authorized by a vote of the stockholders of the company, joined with another corporation, namely, the Illinois, Missouri and Texas Railway Company, in the execution of a mortgage to secure $1,500,000 of the first-mortgage bonds of said last-named company, and which had and were to be issued by said last-named company from time to time, and which mortgage was made to said Frederick Winston and one David Hoadley, who has since departed this life. Winston is made a defendant to the bill of the Cape Girardeau and State Line R. R.; so also the Illinois, Missouri and Texas Railway Company; and also William J. Alt, a bondholder of some of the bonds issued by the last-named company, and numerous other known holders of said bonds, as well as all the unknown bondholders.

In the Cape Girardeau Circuit Court, Winston and Alt made a motion to remove this cause to this court, and it has, accordingly, been docketed here. The plaintiff now moves the court to remand the cause to the Cape Girardeau Circuit Court.

Louis Houck, for the motion; *Hitchcock, Lubke & Player, contra.*

TREAT, J.:

This cause was removed into this court by Frederick S. Winston and William J. Alt. Plaintiff brought suit against the Illinois, Missouri and Texas Railway; also the trustees under the deed of trust named (Winston being the surviving trustee), and several corporations and individuals alleged to be holders of bonds secured by a deed of trust executed by the defendant corporation, to-wit: the Illinois and Texas Railway Company, *upon the property of the plaintiff*, pursuant to the alleged contracts and other writings obligatory in the petition set out and referred to. The said cause was removed by Winston and Alt, on the hypothesis that the act of 1866—that is, the second clause of section 639 of the Revised Statutes of the United States, governed their rights, and that they were within its terms.

It is apparent that, if the act of 1866, in the respect named, is still in force, the controversy, so far as it concerns said Winston, who is the trustee, can not be determined without the presence of the grantor in the deed—which deed is sought to be invalidated—nor can the case be determined as to the rights of Alt, who is one of the many bondholders secured by the deed of trust. Therefore, if the motion is to be controlled by the act of 1866, the cause must be remanded.

If this be not correct, it becomes necessary to decide whether the act of 1875 (18 U. S. St. 470) repeals the act of 1866, as reproduced in clause 2, section 639, of the Revised Statutes. Section 10 of the act of 1875 declares that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed." Section 2 of the act of 1875 declares that "when, in any suit mentioned in this section, there shall be a controversy WHOLLY between citizens of different states, and which can be fully determined as between them, then *either* one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," etc. If the purpose of this act (1875) was to restore what, obviously, is the constitutional limit of the jurisdiction of United States courts, by confining them to controversies which are *wholly* between citizens of different states, then the act of 1866 is repealed.

The strange anomaly presented by the act of 1866, whereby suits were "split," leaving one portion to be tried in a United States court, and the other in a state court, it may have been designed by the act of 1875 to remove from the statute-book. It will be observed that section 2 of the act of 1875 contemplates, as does section 1 of the same act, that the controversy must be "wholly" between citizens of different states. Under repeated decisions of the United States Supreme Court, prior to the act of 1866, *all* of the parties, plaintiff and defendant, had to fall within the provisions of the act of 1789. If the act of 1866 was constitutional, the strange result followed that, where a United States circuit court had no *original* jurisdiction, and could have none constitutionally, from the joinder of parties, it could acquire jurisdiction, despite the status of the parties, by removal from a state court. The constitution contemplated, as frequently decided, that the party plaintiff and the party defendant, whether including one or many persons, should be citizens of different states. How, then, consistent with its requirements, could a suit instituted in the state court, which, as there instituted, would be beyond federal jurisdiction, be removable into a United States court by changing the suit, through the *splitting* process, into two suits? If this were allowable, then fragments of suits would

be substituted for entire suits, and, through a *strange* process, the United States courts would obtain jurisdiction of fragments where they had none of the suit itself.

Hence the conclusion is: First, that this case does not fall within the terms even of the act of 1866; second, the act of 1866, in the respects named, is repealed by the act of 1875; third, if neither of the foregoing propositions is correct, those peculiar provisions of the act of 1866 must be held to be unconstitutional and void.

DILLON, J.:

I concur in the result of the foregoing opinion, for reasons which I proceed briefly to state.

Two only of the many defendants united in the petition to remove the cause. The removal was sought under the act of 1866 (R. Sts., sec. 639, cl. 2), the petition for the removal being filed at the September term, 1876, of the state court. The petition only sought to remove the cause so far as it related to the two defendants, Winston and Alt, and the state court only ordered the cause *as to them* to be transferred to this court. As to all the other defendants, it still remains in the state court.

Winston, as surviving trustee in the deed of trust, represents all the bondholders, including Alt. A deed of trust was made, purporting to be executed by the plaintiff corporation *and* one of the defendant corporations, viz: the Illinois, Missouri and Texas Railway Company, both Missouri corporations, upon property which the plaintiff's bill claims to belong to it, to secure bonds executed by the said Illinois, Missouri and Texas Railway Company. The bill alleges that the said deed of trust, for want of authority in the plaintiff's officers to execute it, and for other reasons, did not bind the plaintiff corporation, and is ineffectual to convey its property or create a lien upon it; and the prayer of the bill is that the deed of trust be declared void, so far as it covers the property of the plaintiff (which would seem to be the main security), and that the bondholders under the deed of trust be declared to have no lien upon the said property, and for general relief.

It seems to be too plain to admit of any doubt that, to the bill to annul the deed of trust, the two companies which executed it as grantors are necessary parties. The Illinois, Missouri and Texas Railway Company executed the bonds, and it appears from the bill that this company, by reason of the contracts and conveyances therein set forth, had, or claimed to have, an interest in the property conveyed by the deed of trust. No effectual decree could be made, such as the bill seeks, without the presence of the Illinois, Missouri and Texas Railway Company. Now, no attempt was made to transfer the cause, so far as it concerned the company last named. The plaintiff corporation has the right to an adjudication of the case made by its bill. The bill was properly constructed, and contained the parties necessary to secure the relief sought. To the determination of the case made by the bill, the Illinois, Missouri and Texas Railway Company was a necessary party, and there can be no final or effectual determination of the case *made by the bill* without the presence of that company.

If the attempted removal of part of the case here were sustained, this court might decree the deed of trust invalid; and the state court, on the part of the case remaining there, might make a decree precisely the other way; and to both decrees the plaintiff would be a party.

I am of opinion that the case made by the petition for the removal is not one which is embraced within the act of 1866, as it is embodied in section 639, clause 2, of the Revised Statutes. It is not, therefore, necessary for me to give any opinion whether the second clause of section 639 is repealed by the act of March 3, 1875, or, if not thus repealed, whether it is in conflict with the provisions of the federal constitution, which limits the extent of the jurisdiction of the courts of the United States. The motion to remand must be allowed.

MOTION SUSTAINED.

LIBEL—OPENING CASE TO JURY.

SCRIPPS v. REILLY.

Supreme Court of Michigan, January Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, " ISAAC MARSTON, " B. F. GRAVES, } Associate Justices.

1. AN OPENING TO THE JURY should state the facts which it is expected to prove, but should not set forth evidence in detail.

2. REVIEW OF DISCRETIONARY RULINGS.—Where the exercise of a court's discretion amounts to an abuse of it that is likely to affect the legal rights of a party, the appellate court will review it, although the abuse resulted from accident, inadvertence or misconception. So *held*, where counsel were allowed to open a case improperly.

3. LIBEL—EXTRINSIC MATTERS.—Plaintiff's counsel was allowed, under objection, to read in his opening to the jury various articles which had appeared at different times in the paper that had published the alleged libel, the purpose being to introduce them as tending to show malice. Some of these being afterward so introduced, were excluded from evidence; others were not offered at all. The judge charged that counsel had "in his opening read several articles which at the trial were finally excluded. These should also be withdrawn from your consideration." *Held*, that the charge was insufficient, as, in saying nothing of the articles which had been read, but not afterwards offered in evidence, the jury were left to give them such weight as they chose; and, as extrinsic matters not properly before them, they vitiated the verdict. Judgment reversed accordingly.

4. ——. PUNITIVE DAMAGES.—In an action for libel, libelous publications from the same paper relating to other parties, may be put in evidence to show that the paper was recklessly conducted, and, therefore, liable to punitive damages. Detroit Daily Post Company v. McArthur, 16 Mich. 447, approved.

5. WHETHER THE PUBLICATION of allegations contained in a bill of complaint on the files of the court, is privileged, not decided.

GRAVES, J., delivered the opinion of the court:

Defendant in error recovered judgment in the Superior Court of Detroit, in an action for libel, and plaintiff in error complains of various proceedings at the trial.

Defendant in error was a lawyer, in practice in Detroit. He was a single man. In the spring of 1875 he was elected Circuit Judge of Wayne county, and in the fall thereafter was appointed to fill a vacancy caused by the resignation of Judge Patchin. In 1873 plaintiff in error began publishing the newspaper called the Evening News, and has continued the publication since that time. In 1875 the paper had a large circulation, and the news items of each issue averaged some 200. The parties were not personally acquainted; but the paper opposed the election of defendant in error and supported another gentleman, and during the canvass some intemperate articles were published. Some time in the fall after the election, one Robbins filed a bill in the superior court to obtain a divorce from his wife, and, among other charges in the bill against her, he alleged that she had been guilty of adultery with defendant in error. Almost immediately after this bill was placed on file, a reporter or gatherer of local news for the paper got access to the bill, and, with the help of the city editor, prepared an article covering this

charge in Robbins' bill, and caused it to be published in the paper. This occurred on the 7th of December. This article is the libel complained of. The action was commenced the next day. Plaintiff in error seems not to have been personally privy to the concoction or publication of the article, and was not aware of it, in fact, until his arrest in the action the next day.

It was claimed by plaintiff in error that he had no personal agency in the publication; that he bore no malice against defendant in error; that the subject of the publication, being a proceeding in a court of justice, was within the circle of privilege; and that, in fact, the article complained of was entitled to immunity on the ground of privilege. Defendant in error claimed that he could prove the existence of actual malice. He did not deny that the subject of the article was within the scope of privilege, but insisted that the privilege was abused, and, therefore, that the article was entitled to no immunity on the score of privilege. He also insisted that the paper was, and had been, conducted with gross negligence, and was notoriously addicted to libeling. There was no pretense that the charge in Robbins' bill, which implicated defendant in error, was true.

A great many questions were raised in the progress of the trial; but some of them have not been urged, and others still can not, as the case is shaped, and, as it appears to the court, be definitely examined. There are some important matters, however, which demand full consideration.

The first in the order of proceeding at the trial seems naturally to call for attention first. It relates to the course the counsel for defendant in error was permitted to pursue, against repeated objections, in opening the case to the court and jury. He declared it to be his purpose, as part of his opening, to read at length before the jury a series of articles published in the newspaper during the course of several months, and commencing in the spring of 1875, and running until some time after the appearance of the publication in suit. And the first group suggested consisted of articles from the 19th of March to the 6th of December, none of which referred to defendant in error. The reading of them was objected to on the ground that none of them would be relevant or competent if regularly offered as evidence under the issue. Counsel for defendant in error then stated that he proposed to *read such articles as in good faith he should offer in evidence*, and *he would read them because he could not remember their contents*. The court thereupon ruled that he *might read*, in his opinion, *such articles* as he CLAIMED to be libelous, and which had afterward been retracted. About twenty articles, not relating to defendant in error, and running through the period before indicated, were then read to the jury as part of the opening. An exception was taken to each. They were calculated, from their character, to influence the minds of the jurors against plaintiff in error. The counsel for defendant in error then offered to read at length, as part of his opening, a series of articles published the spring before the publication charged as libelous, concerning the defendant in error when running for the office of circuit judge. This was objected to on the ground that the articles did not tend to show actual malice, and would not be competent if offered as evidence. Counsel for defendant in error then explained that he did not propose to then read them as evidence to show malice, but to read such as he expected to offer and prove afterward, and such as, when put in evidence, would tend to show malice toward defendant in error. The court overruled the objection and allowed counsel to read as he proposed. He then read, as part of his opening to the jury, five articles he claimed tended to show actual malice by plaintiff in error against defendant in error. They bore date March 12, March 22, March 29, March 31, and April 3, 1875.

The counsel for defendant in error then proposed to read at length, as part of his opening, and not as evidence, another series of articles published after the libel. This was objected to on the ground that the articles would not be competent or admissible if offered as evidence. They all referred to the alleged libelous article and the legal proceedings growing out of it. The objection was overruled, and the counsel then read before the jury, as part of his opening statement, an article dated December 8, entitled "Another Libel Suit," etc.; two articles of December 9, one speaking of Mr. Penniman's sympathy for Judge Reilly, and the other having a heading beginning, "Where the Malice Lies;" one article dated December 10, concerning attendance of defendant in error at Justice Harbaugh's Court to make complaints; and one of December 11, headed, "More Contemptible Malice." It does not appear, by the *record*, that a letter in it from Mr. Penniman to the News was read. The opening statement having been allowed to embrace the reading in full of all these publications, and having been brought to a close, the counsel for defendant in error proceeded to offer evidence. None had yet been received, and, although the plaintiff in error had not been able to prevent the reading of the publications to the jury, he was still not able to meet them as evidence for any purpose or in any way. They were lodged in the jurors' minds as matters in the cause they were entitled to receive, but not through the channel the law has made for the conveyance of evidence, and at the stage of proceedings proper for submitting evidence. They were matters which could not fail, when so presented, to prepossess the jury unfavorably against the plaintiff in error. Confining attention now to this branch of the case, it appears from the record that, of the series of publications not relating to defendant in error, and permitted to be read at length in the opening statement on the pledge that they would be afterward offered in good faith as evidence, *five were not even offered as evidence at all at any stage of the trial*, and as to one other, the record is contradictory. Some ten or a dozen, or more, the record being ambiguous as to a few, were not *offered*, except upon the rebutting case, and were then *rejected by the court*, and the residue of this list, being five or six, were reserved until the plaintiff in error had rested his defense, and were then offered and admitted as rebutting evidence. Of the series published in the spring of 1875, concerning the candidacy of defendant in error as circuit judge, and which were read at length in the opening, on the avowal of counsel's belief that they tended to show actual malice by plaintiff in error against defendant in error, and would be offered in evidence for that purpose, *not one was offered during the making out of the case in chief*. They were held back until plaintiff in error had rested, and were then tendered as rebutting evidence. *All were excluded*. There were five in this group.

Of the set published after the appearance of the alleged libel, *five* were given in evidence by the defendant in error to show actual malice, and they were so given, but against objection, as part of his case in chief. The letter in the record, from Penniman to the News, was offered and excluded. Besides these and the article counted on, no other publications were tendered in evidence before the plaintiff in error rested his defense, except four, and these had not been *read at all*, or, so far as appears, even referred to in the opening statement. One of them spoke of the existence of a ring to break down the paper, and, among other things, alleged that defendant in error was aware the paper had not libeled him. Another, under date of July 27, spoke of

Wah Hap, a Chinese laundryman, as having left with clothing belonging to his customers, and this was followed by one on the next day contradicting it. The remaining article of this set was published under date of January 10, 1876. It embraced an original heading, and purported to embody an article copied from the editorial columns of the Chicago Evening Journal concerning the present action for libel, with comments upon its origin, etc.

When the judge came to charge the jury, he referred to the *course* which he had permitted in respect to the opening statement, and observed: "Mr. Griffin, in his opening, read several articles which, at the trial, were finally *excluded. These should also be withdrawn from your consideration and laid out of view in your deliberations upon the case.*" No further reference was made to the subject of the opening statement, and *no caution whatever* was given concerning the articles which had been read at length by permission of the court against objection, but which had not *even been* OFFERED in evidence at all.

The question is, whether the practice, which was here allowed in the opening address, was correct? And, if not, whether the advice quoted from the charge cured the error; and, in case it did not, then whether it is competent for this court to revise the proceeding?

The trial-judge must always have a very large discretion in controlling and managing the routine proceedings at the trial, and it is not necessary to specify the matters to which such discretion extends. It applies beyond doubt to the addresses of counsel, as well as to other incidents. But it must be a reasonable, a legal discretion, and, whether it be so or not, must depend upon the nature of the proceeding on which it is exercised, the way it is exercised, and the special circumstances under which it is exercised. It can never be intended that a trial-judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely mis-stepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion, that the course actually taken was not as wise, or sensible, or orderly as another would have been. For example, if all the articles allowed to be read in the opening statement had been afterwards given in evidence, their reading in the opening, however contrary to settled practice, might not have offered anything proper for consideration here. Questions concerning their admissibility would fall under another head. But where it is manifest, the trial-judge has fallen into a *serious mistake, one likely to have hurt a party*, an error *mentioned in the books as an abuse of discretion*, this court is bound to take cognizance, or disregard its constitutional duty of supervision. It is a chief duty of the trial-judge to secure fair play to litigants, and, so far as practicable, to shape the order and course of proceedings in such a way that neither party will be put to a disadvantage not due to his case, or its mode of management by his counsel. The rules of the court, and what is called the course of the court, have their origin in the purpose to secure fairness in legal controversies, and the order of business and the regulated succession of steps at trials have the same object.

The rule (62) ordained by this court for the circuit courts, in regard to an opening statement, is especially meant to guard against surprise and deception, and to promote fairness; and when it is declared that "it shall be the duty of the plaintiff's counsel, *before offering evidence*, to support the issue on his part, to make a full and *fair* statement of his *case* and of the *facts* which he expects to prove," it indicates very distinctly the extent of both right and duty. It draws a line between "*evidence*" and "*facts*," and contemplates a "*fair*" statement of the "*facts*" expected to be "*proved*" before putting in the testimony or "evidence" by which those "facts" are expected to be "proved." Neither the nature of the proceeding, nor that of the fairness which it is intended to promote, nor the plain meaning of the rule, gives any sanction to the claim that, in this opening statement, the plaintiff's counsel may read at length to the jury any documentary matter he may assert his intention of subsequently offering as evidence. But the position taken in this cause involves the assertion of the right to fill up the opening statement with any depositions on file, and the whole of oral statements of expected witnesses, without regard to objections to admissibility, as evidence. Surely, it can not require much thought to decide against the reasonableness and fairness of such a practice.

The text-books in this country, which deal with the subject, are distinctly agreed concerning the end and scope of the opening address. They all represent it as a proceeding prefatory to putting in evidence, and as one practically necessary to make an advance exhibit of the legal nature of the controversy and its salient peculiarities, and enable the judge, jury, and opposing counsel to apprehend the necessities of the plaintiff's case, and correctly understand the drift and bearing of each step and each offer of proof as it shall occur subsequently; and, considering that its office is to afford preliminary explanation, that it is to precede proofs, and precede controversy before the jury, and is not to embody or convey proof or prepossess the jury, they unite in substantially denying the right to make use of it to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent. A brief summary or outline of the *substance* of the evidence intended to be offered, with requisite, clear and concise explanations, is considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proof at large, or any other course fitted to mislead the triers, should not be tolerated. Of course, there may be cases and instances where a statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional and not within the spirit of the general requirement. Green's Prac., § 443; Burrall's Pr., vol. 1, p. 234; Waite's Pr., vol. 3, p. 86; Tiff and Smith's N. Y. Pr., vol. 1, p. 553; Puterbaugh's Ill. Pl. and Pr. 2nd ed. 589; Bouvier's Inst. 333, 334. See also 1 Archbold Pr. 191; 3 Chitty's Gen. Pr. 878 *et seq;* 2 Broom and Hadley's Com., Am. Ed. 264, 265; Ayrault v. Chamberlain, 33 Barb. 229.

The course in England is not the same as here, as is well-known. But even there the claim made by counsel for defendant in error would not be sanctioned. In Darby v. Ouseley, 36 Eng. L. & E. 518, 525, a civil action for libel, and one which received much attention in court, Chief Baron Pollock observed, with the apparent approbation of all the judges, that "it is the *business of a judge to see that counsel shall not state what he can not prove*, and for this purpose he has always a right to ask counsel if he means to prove what he is stating."

In the case before us, the ground taken is, that counsel for plaintiff *may first put before the jury* whatever he *claims* to be admissible as testimony, and leave the question of its *admissibility* to be decided afterward, and, from time to time during the progress of the trial, if decided at all. And it so happens that a part of the matter which was introduced on this theory was left without having its admissibility as evidence passed upon in any way or at any time. The courts have usu-

ally been very firm in confining counsel within proper bounds, and in guarding jurors against unfair and irregular acts and endeavors; and parties have been deprived of their verdicts upon evidence merely indicating the operation of influences about the outskirts of the trial. It has been many times ruled that counsel, in arguing, may not seek to influence the jurors by reference to matters in the nature of evidence not in proof before them, and that the trial-judge should promptly repress the attempt as something reprehensible. Bulloch v. Smith, 15 Ga. 395; Berry v. State, 10 Ga. 511; Mitchum v. State, 11 Ga. 615; Dickerson v. Burke, 25 Ga. 225; Read v. State, 2 Ind. 438; Tucker v. Henniker, 41 N. H. 317. Again, it has been decided to be error to allow counsel, as part of his argument, to read and comment on minutes of the evidence taken on a former trial of the same action, and that the error was not cured by an instruction to the jury not to consider anything so read. Martin v. Orndorff, 22 Iowa, 504; State v. Whit, 5 Jones (N. C.) 224. See also the remarks of the court upon the statement of foreign matter in argument in the case of Fry v. Bennett, 3 Bos. 200. In Willis v. Forrest, 2 Duer, 310, it was ruled that, where the *pleadings* contained irrelevant matter, it was improper to allow counsel to read them to the jury. In Mitchell v. Borden, 8 Wend. 570, an objection being sustained to a notice of justification in slander, and thereby causing the exclusion of evidence, it was ruled that the objection to the evidence was not a proper subject of comment to the jury. In Hix v. Drury, 5 Pick. 296, the court said, if a paper, capable of influencing the jury on the side of the prevailing party, gets to them *by accident*, and is read by them, the verdict will be set aside, even though the jury *think* they were not influenced by it, as it is impossible for them to say what effect it might have had; and in Whitney v. Whitman, 5 Mass. 405, where a material paper, not read to the jury, was delivered to them by mistake, and not discovered until after delivery of the verdict, the court finding that the paper furnished material evidence for the prevailing party, refused to examine the jurors, and held that the matter must be governed by the *tendency* of the paper, and that the verdict must be set aside. In the case of the State v. Hascall, 6 N. H. 352, the defendant was convicted of perjury, whereupon it was shown that papers calculated to make an unfavorable impression on the jury were exhibited by the prosecution at several public places where jurors boarded, and were read in the hearing of jurors during term and before the trial, and the court decided that for this cause the verdict should be set aside. In Spenceley v. De Willott, 7 East, 108, which was an action for usury, a new trial was granted because the plaintiff had published a statement of the case, which was distributed about the court and hall before and at the time of trial; and, in Coster v. Merest, 3 Brod. and Bing. 272, a new trial was allowed on an affidavit stating that hand-bills, reflecting on plaintiff's character, had been distributed in court at the time of the trial, and had been seen by the jury; and the court refused to hear affidavits, made by all the jurors, stating that no such placard had been shown to them.

There is no occasion for dwelling on this part of the case, after what has been said. The practice pursued was wrong, and the error was not cured or materially alleviated by the charge. The jury were not even told to disregard such of the articles as were read in the statement of the case, and not afterwards offered in evidence, and the special direction to refuse attention to those which had been offered and rejected, was calculated to imply in the jurors' minds that they were entitled to regard all others.

The omission to tell the jury to disregard the articles not offered was no doubt an inadvertence of the court. The effect, however, was the same as if it had been designed. But if the charge had been to disregard all unadmitted articles, it would not have cured the error, because it is quite impossible to conclude that the jurors had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held, if the counsel for defendant in error had been properly confined in his opening statement. The course of fair and settled practice was violated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterward to cure the mischief, so long as an inference remains that the remedy applied by the court was not adequate; and there is no doubt of the right of this court to revise in such a case as this. If the trial-court may pursue any course it pleases in relation to the opening statement, if it may act independently of all control, then the idea of a rule to be prescribed by this court, under the constitution and legislative enactments, for its guidance and government, is preposterous and absurd. But the point is too plain for argument. As already suggested, this court will not revise such matters, unless there is plain evidence of action, amounting to what is called an abuse of discretion, and calculated to injuriously affect the legal rights of a party; and when such is the case, whether the result of accident or inadvertence or misconception, it will take cognizance. The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal.

After the opening, the litigation proceeded upon the idea, that the fact that Robbins' bill had been placed by him on the files of the superior court, gave the right to the newspaper to publish his allegation in the bill, implicating defendant in error, as matter of privilege. Whether in point of law the particular occasion was privileged or not, is not distinctly raised, though, if it was not privileged, a number of serious matters cease to be important, and ought not to encumber the case. Upon the hearing, it was the opinion of counsel that the question was not raised, and although counsel for defendant in error touched upon it, it was not discussed. The court at present entertain a strong impression that the actual *occasion* was not such as to entitle plaintiff in errror to claim it as one which could afford immunity, but, in view of the circumstances, do not feel at liberty to come to a settled determination. Before doing so, a fair presentment and discussion of the question ought to be had. Still, in contemplation of this impression, and the actual posture of the case, and the nature and shape of the questions concerning this claim of privilege, the court is not inclined to examine these questions now.

It is objected, that the court erred in admitting certain publications relating to Grelling, Warner and Wah Hap. It was made a question whether the paper was conducted with sufficient care to save plaintiff in error from punitory damages in case the jury should find the article libelous, and no actual malice. If such mode of proof was proper, these articles tended to show the want of such care. The plaintiff in error claims that the charge that the paper was conducted recklessly was only provable by evidence of a general character, or by the circumstances which attended the publication in suit. This position is not assented to. The language of the court, in Detroit Daily Post Company v. McArthur, 16 Mich. 447, plainly imports the right to show the "recurrence of similar" libels, and points to the admissibility of specific acts, to establish "the want of solicitude for the proper conduct of the paper." It implies distinctly that particular instances may be adduced to make out the principal fact. See further, Milwaukee and St. Paul Railway Company v.

Arms, 1 Otto, 489, 3 Cent. L. I. 220; Com. v. Jeffries, 7 Allen, 548; Com. v. Morgan, 107 Mass. 199; Sheldon v. Hudson River R. R. Co., 4 Ker. 218; Field v. N. Y. Central R. R. Co., 32 N. Y. 339; Baulec v. N. Y. & Harlem R. R. Co., 59 N. Y. 356; Penn. R. R. Co. v. Stranahan, 79 Penn. St. (not yet out); Clarke v. Periam, 2 Atk. 333; Barrett v. Long, 3 H. L. 395.

There is no dispute but that the circumstances connected with the preparation and publication of the particular article and evidence of the actual management may be shown, and we have no occasion now to see whether other modes of proof might not be allowed.

The court admitted several articles against objection, and on the claim that they tended to show actual malice on the part of plaintiff in error; but it would seem that, on deliberate consideration, the judge finally concluded the admission of this evidence was improper, and we now see no reason to question the correctness of his final opinion. When he came to charge, he explained his change of opinion to the jury, and undertook to expunge the evidence. If it was practicable to cure the error in this way, which may be doubted, the charge was objectionable for want of distinctness. It did not convey to the jury what items of proof were to be rejected. As we understand the record, the case was submitted upon the theory that no actual malice had been shown, and that the right to give punitory damages must depend on whether the paper was managed with due care to avoid the publication of libelous matter.

Complaint is made of the admission of the News' republication of the article from the Chicago Journal, or, rather, of the admission of the part of it which was offered. It appeared, as before stated, in the issue of the News of January 10, 1876, being more than a month after the publication of the article in suit, and more than a month, also, after the suit was instituted. The portion offered and received was, according to the record, *so much of it* as related to the defendant in error, and it was tendered and admitted as bearing upon the question of care and prudence in editing said paper. Without considering any other ground of objection, it is enough to say, that being a publication made after the alleged libel, it was too remote in point of time to afford any fair legal inference of the management of the paper before and at the time of the appearance of the libel. And the mode of management afterward was not one of the substantial facts in the case.

The instruction based on the evidence, relating to the management of the paper, was not as guarded as it should have been. It went beyond the request of the counsel for defendants in error, and was calculated to mislead. The correct view is well indicated in the case of Detroit Post Company v. McArthur, and, no doubt, the matter will be properly explained on another trial.

A point is made that plaintiff in error was entitled to have the jury say upon what count or counts they found in case of finding for defendant in error, and in view of the structure of the declaration of the facts, it appears to us there was ground for this claim.

The judgment must be reversed, with costs, and a new trial ordered.

DURING the past year there were published in England 101 new works on law and jurisprudence, and 63 new editions of legal works.

THE supreme court of South Carolina has rendered a decision in the quo warranto proceedings against the Hayes electors, dismissing the case, on the ground that the proceedings were illegally presented on the part of the state, instead of the United States. This technical flaw disposes of the electoral case of this state.

THE PASSAGE OF LAWS — LEGISLATIVE JOURNALS.

THE TOWN OF SOUTH OTTAWA v. PERKINS.

Supreme Court of the United States, October Term, 1876.

In an action by the *bona fide* holder of a negotiable municipal bond purchased before maturity without notice of its invalidity other than that imparted by the legislative journals, it can not be shown by such journals that a law, printed and promulgated as such by the state authorities, and under which the bond on its face purports to have been issued, is null and void, because not enacted in conformity with the requirements of the state constitution, although such evidence would have been admissible against one not a *bona fide* holder. Bradley, Miller, Davis and Field, JJ., *dissenting*.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Chief Justice WAITE delivered the opinion of the Court:

This was an action brought by Perkins, the plaintiff below, to recover the amount due upon two negotiable bonds of the town of South Ottawa, in the usual form, for one thousand dollars each, made payable to the Ottawa, Oswego and Fox River Railroad Company, or bearer, in three years from July 1, 1869, with coupons for the semi-annual payment of interest attached. They each contained recitals as follows:

"This bond is one of a series of 20 bonds, bearing even date herewith, each for the sum of $1,000, * * * and is issued in pursuance of an election held in said town on the 8th day of October, 1866, under and by virtue of a certain act of the legislature of the State of Illinois, approved February 18, 1857, entitled 'an act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads;' * * * at which election a majority of the legal voters participating in the same voted 'for subscriptions' to the capital stock of said railroad in the sum of twenty thousand dollars, and to issue the bonds of said town therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application having been made to the town clerk of the town, and said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid."

The constitution of Illinois, adopted in 1848, contains the following provisions:

"Art. III., sec. 1. The legislative authority of the state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

"Sec. 3. Each house shall keep a journal of its proceedings, and publish them. * * *"

"Sec. 21. * * * On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members-elect in each house."

"Sec. 23. * * * Every bill having passed both houses shall be signed by the speakers of the respective houses.* * * * "

"Sec. 26. * * * An accurate statement of the receipts and expenditures of public money shall be attached to and published with the laws at the rising of each session."

"Sec. 39. The general assembly shall provide by law that * * * the copying, printing, binding, and dis-

tribution of the laws and journals * * * shall be let, etc."

"Art, IV., sec. 21. Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated;" and if thereafter approved in each house by a majority of the members elected thereto, "it shall become the law, notwithstanding the objections of the governor. * * * "

The revised statutes of the state, approved March 3, 1845, provide as follows:

Chap. 96, sec. 7. "All public acts, laws, and resolutions that have been, or shall be, passed by the general assembly of this state, shall be carefully deposited in the office of the secretary of state; and the secretary of state is hereby charged with the safe keeping of said office, and all laws, acts, resolutions and records deposited, or which shall hereafter be deposited therein."

Sec. 8. "The secretary of the senate and clerk of the house of representatives, at the close of each session of the general assembly, shall deliver to the secretary of state all books, bills, documents and papers in the possession of either branch of the general assembly; * * * and the secretary of state is hereby required to file the same in his office."

Chap. 84, sec. 3. "The journal of each house of the general assembly shall hereafter be kept in well-bound books. The secretary of the senate and clerk of the house of representatives shall, * * * within ten days after the adjournment of each session of the general assembly, deposit the original journals, kept by them as aforesaid with the secretary of state."

Sec. 4. "The secretary of state is authorized and required to cause to be made out true and accurate copies of all laws, acts, and resolutions of the general assembly which may be required to be printed; and such copies so made out he shall deliver to the person or persons authorized to print the same." * * *

Sec. 5. "And the secretary of state shall likewise superintend the printing of such laws, acts, and resolutions, carefully comparing the printed copies with the original laws and rolls deposited in his office, correcting all errors that may appear in such printed copies, and shall make and cause to be printed, at the end of such printed copy, his certificate that the acts and resolutions so printed are exact copies of the rolls in his office."

Sec. 7. "Each edition of the laws required to be published shall, &c., and the day on which each act takes effect shall be stated in the margin, * * * and the day * * * when it became a law * * * shall be stated at the end of the act, omitting the name and style of the governor, and the speakers of the two houses of the general assembly."

Sec. 9. "There shall be published at the close of each session of the legislature, two thousand copies of the laws passed at such session, one thousand copies of the journals of the senate, one thousand copies of the journals of the house of representatives, and one thousand copies of the report of the two houses."

Chap. 40, sec. 1. "The printed statute books * * * of this state, * * * printed under the authority, etc., shall be evidence, in all courts and places in this state, of the acts therein contained."

The Ottawa, Oswego and Fox River Railroad Company was incorporated June 21, 1852.

With these provisions of the constitution and these laws, or others of like import, in force, what purported to be a law of the state properly enrolled, signed by the speakers of the two houses and approved by the governor February 18, 1857, was filed in the office of the secretary of state. It was printed in the edition of laws published at the close of the session of 1857. It was entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," and purported to provide, among other things, that any county or township near the route of the Ottawa, Oswego and Fox River Railroad may become subscribers to its capital stock, and may issue coupon-bonds for the amount of stock so subscribed, the proposition for such subscription having been first submitted, in the manner therein provided, to the inhabitants of the county or township and approved by them.

The inhabitants of the town of South Ottawa, October 8, 1866, at an election purporting to be held under this law, voted, by a majority of those participating in the election, to subscribe to the stock of the railroad. Afterwards, March 27, 1869, an act was passed by the general assembly of the state "to amend an act entitled an act to incorporate the Ottawa, Oswego and Fox River Railroad Company," authorizing an extension of its line, and providing, sec. 2, "that any city, county, town, or township near to or through which said railroad is now or may hereafter be located, is hereby authorized to subscribe to the capital stock of said railroad upon the terms and conditions prescribed in an act entitled 'an act to authorize, etc.,' in force February 18, 1857." Again, April 20, 1869, another act was passed "to amend an act entitled an act authorizing certain cities, counties, towns, and townships to subscribe to the stock of certain railroads, in force February 18, 1857," which provided for further subscriptions by cities, counties, towns, and townships to the capital stock of the company. This act was passed over the veto of the governor. After this, May 4, 1869, the supervisors and town clerk of the township of South Ottawa subscribed to the stock under the authority of the vote of October 8, 1866, and issued bonds in payment of the subscription, of which those now in suit are part.

The plaintiff below is the bona fide purchaser of his bonds, before maturity, and without notice of any objection of any kind whatever to their validity. The first installment of interest was paid at maturity, but after that, default was made both in the payment of principal and interest as they respectively fell due.

Upon the trial below the town offered to prove, by the journals of each house of the legislature, that there was no entry in the same of the passage by the senate of the act of February 18, 1857. The testimony was objected to and ruled out. Substantially the same question was raised by demurrer to a plea. The only errors assigned here are: 1. Sustaining the demurrer to the plea. 2. Excluding the testimony offered to invalidate the act of February 18, 1857.

As early as 1853, the supreme court of Illinois decided, in Spangler v. Jacoby, 14 Ill. 299, that it was "competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to, to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution, that the signatures

of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is, that an act thus verified became the law pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed, the presumption will sustain the law; for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall." The question came up in that case upon a motion to quash a summons made returnable in a day named in what was supposed to be an act passed at the last preceding session of the legislature, fixing the times for holding the McDonough circuit court, but which, it was claimed, had never in fact been constitutionally passed. The times for holding the court had been before established by law, and it was insisted that, as the supposed law had never been passed, the old law was still in force, and that the writ should have been made returnable on the day specified in that. This case was followed, in 1855, by Turley v. County of Logan, 17 Ill. 151. There, a law was supposed to have been passed at the session of the legislature in 1853, for the removal of the seat of justice of Logan county, by a vote of the people. In the fall after, a vote was taken, which resulted in favor of the removal. Turley and his associates then filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the house of representatives the full number of times required by the constitution, and so was no law. The fact being as alleged, the injunction was, in the first instance, allowed; but afterwards, in February, 1854, the same legislature met in extra session, and, on the recollection of members, and by the manuscript notes of the clerk, the house of representatives amended its journal so that it showed the bill had been read the requisite number of times. Thereupon the supreme court, when the case came there, while recognizing fully the authority of Spangler v. Jacoby, affirmed a decree dissolving the injunction and dismissing the bill, for the reason that it was within "the power of the same legislature, at the same or a subsequent session, to correct its own journals by amendments which show the true facts as they actually occurred."

The same question was also considered by the same court in Prescott v. The Trustees of the Illinois and Michigan Canal, 19 Ill. 324, decided in 1857. There, Prescott and Arnold were entitled to purchase, at the appraised value, certain lots in Chicago, which had been appraised twice, and the point to be decided was whether they should pay according to the first or second appraisal. The second appraisal was made under a law supposed to have been passed February 14th, 1851, but which the journals showed had never, in fact, passed either branch of the general assembly. Accordingly, the court held, upon the authority of Spangler v. Jacoby, that the second appraisal was invalid, and that the parties had the right to purchase under the first. The next case was that of The Supervisors of Schuyler County v. The People, 25 Ill. 181, which came before the court in 1860. There, the Rock Island and Alton Railroad Company sought to compel the supervisors of Schuyler county to issue and deliver to it bonds of the county in payment of an alleged subscription of the county to the capital stock of the company. It was objected that the senate journal did not show that the bill incorporating the railroad company was read three times in that body before it was put on its final passage; but the court, while still approving Spangler v. Jacoby, held that the constitution did not require the fact that the bill had been read three times to be entered on the journals, and, consequently, that the validity of the law could not be impeached on that ground. The mandamus asked for was accordingly granted. In 1864, the same question was again presented in The People v. Starne, 35 Ill. 121. That, too, was an application for a mandamus to compel the treasurer of the state to countersign, register and pay a warrant issued upon him in favor of Barnes, the relator, by the auditor of public accounts. The warrant was issued upon the authority of what was supposed to be a statute of Illinois, approved February 14th, 1863; but, it being shown that the journal of the house of representatives did not contain entries to the effect that the bill was passed by a majority of the members-elect, or that the vote was taken by ayes and noes upon the final passage, the mandamus was refused. In the opinion of the court, the authorities are extensively reviewed and the rulings in the previous cases re-affirmed, but nothing more.

Without considering in detail all the cases which follow, and contenting ourselves with the general statement that in no one of them has the doctrine first announced in Spangler v. Jacoby been in any particular extended, we come to that of Ryan v. Lynch, 68 Ill. 160, decided in 1873. There, certain tax-payers of the town of Ottawa sought to enjoin the tax-collector from collecting a tax which had been levied to pay interest upon bonds issued in aid of the Ottawa, Oswego and Fox River Railroad Company, upon the ground that the act under which the bonds were issued, that of February 18th, 1857, the same which is now under consideration, had not been enacted in conformity with the requirements of the constitution. No person appeared as plaintiff, except the tax-payers, and no one as defendant, except the tax-collector. At the hearing in the court below it was proven, and, so far as appears, without objection, that the journal of the senate did not show that the bill had ever passed that body. Upon this proof, the court, recognizing the authority of Spangler v. Jacoby, and the other cases which followed it, granted the injunction asked for. In the supreme court, on appeal, it was insisted that the decree ought to be reversed, because the bondholders had not been made parties; but it does not appear to have been suggested that, as against *bona fide* bondholders, the testimony to invalidate the statute was inadmissible. The objection to the want of parties was overruled, and the action of the court below affirmed, upon the authority of the earlier cases. Following this is the case of Miller v. Goodwin, found in 7 Ch. L. N. 294, but not yet reported in the regular series of the reports of the state. The facts in that case we do not know. The opinion of the court alone is given in the publication to which we have been referred. From that it appears that, upon proof admitted showing that the journals did not contain the requisite evidence of the passage of the law, that of February 18th, 1857, it was adjudged invalid. How the question arose, or between what parties, is not stated; and, so far as we have been able to discover, the court has done nothing more than re-affirm what was originally decided in Spangler v. Jacoby.

Looking, then, to that case to ascertain what the rule is which has been so uniformly adhered to, we find it thus stated on page 300: "When a contest arises as to whether the act was thus (constitutionally) passed, the journal may be appealed to, to settle it." By this rule we must be governed. It is the construction which the courts of the states have uniformly given to a provision of the constitution of the state, and which has become a rule of decision for us. This brings us to consider whether such a *contest* has arisen, or can arise, in this case.

Prima facie, an act enrolled, signed by the speakers of the two houses, approved by the governor, deposited in the office of the secretary of state, and published, under his superintendence, among the laws certified by him, is a valid law. It has always been so held by the courts of Illinois. It was made part of the original rule as laid down in Spangler v. Jacoby, and it has never been departed from since. In that case the language of the court (p. 300) is: "The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law." So, in Illinois Central R. R. Co. v. Wren, 43 Ill. 79, it is said "the laws certified by the secretary of state, and published by the authority of the state, must be received as having passed the legislature in the manner required by the constitution, unless the contrary clearly appears." And again, no longer ago than last year, in Larrison v. P., A. & D. R. R. Co., 77 Ill. 18, "if we find a law signed by the speakers of the two houses and approved by the governor, we must presume that it has been passed in conformity to all the requirements of the constitution, and is valid until the presumption is overcome by legitimate proof."

It follows therefore that, if for any cause this "legitimate proof" can not be made, the law stands. Can it be made in this case? That is to say, can a municipal corporation, that has issued its bonds and put them on the market as commercial paper upon the faith of this law, be permitted to show, as against a *bona fide* holder of the bonds, that the law had never, in fact, been passed? The courts of Illinois have not, as yet, so far as we have been able to ascertain, answered this question directly, and we are, therefore, left free to answer it for ourselves.

The law was enrolled; signed by the speakers of the two houses; approved by the governor; deposited in the office of the secretary of state; published by him with the requisite certificate among the laws passed at the session of the legislature in 1857; acquiesced in by the people of the state as a valid law for more than thirteen years after its publication; accepted and acted upon by the inhabitants of South Ottawa, in October, 1866, when they voted under it for a subscription to the stock of the railroad company, and authorized the issue of the bonds of the township in payment; recognized as a valid and existing law by the legislature of the state, March 27th, 1869, and April 20th, 1869, when laws were passed referring to it as in force and amending it, and finally acted upon by the officers of the township when, in obedience to the vote of the inhabitants, they subscribed to the stock of the railroad company, and issued the bonds authorized by the act in payment.

In this condition of things, the courts were bound to take judicial notice of it as a law in force. This was expressly decided in Illinois Central R. R. Co. v. Wren, *supra*, where it was said: "Although we take judicial notice of all acts of the legislature signed by the governor and found in the office of the secretary of state, and although, for some purposes, we may take judicial notice of the legislative journals, yet it is not our province, at the suggestion or request of counsel, to undertake to explore these journals for the purpose of ascertaining the manner in which a law, duly certified, went through the legislature and into the hands of the governor. If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of the legislative journals, and introduce the proof into the record."

Under this ruling the plaintiff below made out his case, when he proved the execution of his bonds and put them in evidence, and, in the absence of proof by the defendant, he was entitled to his judgment, even though the law might not have been constitutionally passed, because it was no part of the duty of the court "to explore the journals for the purpose of ascertaining the manner in which a law, duly certified, went through the legislature." But if it was no part of the duty of the court to make this exploration before deciding that a *prima facie* law was a law in fact, was it the duty of the plaintiff to make it before purchasing, in the open market, commercial paper issued and put in circulation upon the faith of such a law? Is the purchaser of such paper bound to know more of the public law which governs his transactions than the court that must pass upon his rights when disputes are to be settled? And if not, can one who borrows money upon the faith of such a law, keep the money and refuse to pay the lender, because upon further investigation he finds the fact to be that the law was never passed? Reverse the case. Suppose the town had subscribed for the stock and paid the subscription, could the railroad company keep the money and refuse to issue the stock because after the transaction it had ascertained that a vote had not been taken by ayes and noes in one of the houses upon the final passage of the bill? Certainly not, and the reason is obvious. Under such circumstances the law estops the party from asserting the falsehood of that which appears to be true. This court has, from the beginning, applied this rule to this class of cases. It was first stated in Commissioners Knox Co. v. Aspinwall, 21 How., 545, where, using the language of Ch. B. Jervis in Royal British Bank v. Tarquand, 6 Ellis, & B. 527, it was said: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, will find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." It is unnecessary to refer to the numerous cases which have come up since. While some of them have gone farther than the English court did in that from which the quotation was made, none of them have fallen short of it. We need not go farther in this. The purchasers of these bonds were bound to read the statute under which they were issued; but they were not bound to do more. Finding it upon the statute-book, apparently in force, they had the right to infer that it was actually in force, and govern themselves accordingly.

It must be remembered that this is not a case of construction. The question is not whether the law admitted to be in force confers the necessary power, but whether a law which does confer the power, and is apparently in force, can be shown not to have been in fact passed according to the requirements of the constitution, after parties have acted upon the faith of it and changed their condition. When the question is one of construction alone, all parties stand upon an equal footing and each can judge for himself. If a mistake occurs, it is one of law and not of fact. Here the question is one of fact; was the law passed or was it not? *Prima facie* it was passed, and both parties acting upon this *prima facie* case, and supposing it to be true in fact, have become bound; one has borrowed and the other lent. The lender has performed his part of the contract and delivered the money. The question now is, whether the borrower can refuse to repay as agreed, because, since he took the money, he has discovered he ought not to have borrowed it.

While the Supreme Court of Illinois has not yet, as we understand, decided the precise question now be-

fore us, from an examination of its rulings in cases of a similar character, we think we may safely assume that, when called upon to do so, its judgment will not be in conflict with ours.

In Jameson v. The People, 16 Ill. 258, decided in 1855, an attempt was made by *quo warranto* to raise the question of the corporate existence of the town of Oquawka. The objection was, that the vote upon the question of becoming a corporation, and, upon the election of the board of trustees, was taken by ballot instead of *viva voce*. To this it was answered, that the corporation, from 1851 and for more than four years, had been recognized as a public municipal corporation, and exercised the powers and franchises conferred upon such corporations by law; passed and enforced ordinances; levied and collected taxes; brought and defended suits; made contracts and incurred liabilities; that the legislature had twice recognized its existence, once, June 21st, 1852, by an act authorizing it by name to subscribe to the capital stock of certain corporations, and again, February 8th, 1855. The plea stating these facts was demurred to, and the court, in passing upon the demurrer, said: "The acts of the legislature referred to are public acts, and authorize the president and trustees of the town of Oquawka, as a corporation, to subscribe stock in a certain railroad company, and also to subscribe stock in a certain plank-road company, upon conditions in said acts mentioned; to issue and negotiate bonds of the corporation; to provide for paying interest on such bonds, and to levy and collect taxes upon property within the corporation. These acts, recognizing the existence of the corporation, and empowering it to act as a body corporate in issuing and negotiating obligations of the town, and upon the faith of which individuals may have invested their money, preclude inquiry into the question of the original legal organization of the town, and are conclusive upon the question of the existence of the corporation. If there is no such corporation, all acts done under the supposed corporate powers are mere nullities, and no liabilities can exist by reason of contracts made in the corporate name, except, perhaps, against individuals who never contemplated themselves incurring personal liabilities by acts performed in an official capacity. Were we to hold, after this acquiescence of the public and these recognitions of the legislature, that the town remains unincorporated on account of some defect in its original organization as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities? Municipal corporations are created for the public good, are demanded by the wants of the community; and the law, after long and continued use of corporate powers and the public acquiescence, will indulge in presumptions in favor of their legal existence. * * * It would seem incompatible with good faith and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it is not a body corporate; and we do not think the law requires us to do so." This is forcible language; but it is forcible only because it states clearly an elementary principle of common honesty, which has a place in the conscience of every right-thinking man.

We do not care to pursue the subject further. The bonds on which the suit was brought are *prima facie* valid, and, as between these parties, the law will not admit the testimony offered to show they are void. In the absence of proof they stand. The question is not one of construction of laws and constitutions, but of evidence. To admit the testimony would be to ignore a principle of commercial honor upon which we have predicated a long series of decisions; and this, not because the courts of Illinois have as yet decided otherwise, but because it is thought they may. We prefer to wait until that step is taken before we decide that it binds us. It is one thing to decide as between a tax-payer and tax-collector, in the absence of an innocent third party, that a tax which has been levied by the proper authorities shall not be collected, and another to decide that the innocent third party can not compel a levy of the tax. The first question the courts of Illinois have decided; the last they have not.

The judgment of the circuit court is affirmed.

THE BOARD OF SUPERVISORS OF KENDALL COUNTY v. POST.

The facts of this case are substantially the same as those in The Town of South Ottawa v. Perkins, just decided, the only difference being that the vote of the inhabitants of the county was taken after the passage of the act of March 27, 1869. The judgment of the circuit court is affirmed, upon the grounds stated in the opinion which has just been read.

Mr. Justice Bradley dissenting:

I feel obliged to dissent from the opinion of the court in these cases. It holds as binding upon the parties a supposed statute of the state, which the state courts do not regard as such. A similar result, I think, was never before reached in the history of our jurisprudence. The state courts have frequently held a state law to be valid, which the federal courts have declared invalid from some repugnancy to the constitution or laws of the United States; but in such cases the decision of the federal courts is paramount and binding. In the case before us our decision has no binding effect on the state courts, and the spectacle is presented of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a law of that state, without any power to arbitrate between them. In saying, however, that their jurisdiction is co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. But, as a matter of propriety, and, indeed, of right, the decision of the state courts is the more binding and authoritative of the two; for it is declared by the judiciary act, as a fundamental principle, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Sec. 34. And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where, as before said, the federal constitution and laws are concerned; and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities.

Now, in this case, it is undeniable that, by the uniform construction of the constitution of Illinois by the courts of that state, it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the constitution. This is the uniform tenor of the decisions, from the case of Spangler v. Jacoby, in 1853 (14 Illinois), to the present time. The very law under consideration in this case has been passed upon and held to be invalid. Ryan v. Lynch, decided in November, 1873, and Miller v. Goodwin, decided in January, 1875. It is not a law of the state to-day, according to the decisions of the state courts; whilst by our decision it is held to be a law, binding upon the parties in this case. It is held to be a law, because the parties treated it as a law under the *prima facie* evidence furnished by the signatures of the speakers and the governor.

How many persons have so treated it we do not know. What are the people of Illinois to do? Are they to obey the statute as a law, or are they not?

To say that the federal and state courts differ from each other merely on a point of evidence, seems to me to belittle the nature of the controversy, which really is a difference of construction of the constitution of Illinois, whereby a law is held valid by one court, and invalid by the other. It was shown in this case by the legislative journals, as it was in the cases in Illinois, that the law in question was never passed.

The argument that, as the parties acted under the statute, supposing it to be a law, they are now estopped to deny its validity, does not seem to me to be sound. Every person is bound to know what the law is. The question here is one of legal authority, not of mere performance of conditions. If the county or township which gave the bonds had no legal authority to give them, their acts can not create such authority. Power can not be delegated in this way, either to officials or to majorities. A man can not make himself my agent by merely assuming to act as such. If money was wrongfully obtained by a mutual mistake of the parties in this respect, it ought justly to be returned; but on that ground only, no other. What the rights of the parties may be in this point of view I am not prepared to say; but I am clear that no mutual mistake operated to give legal authority where there was none, or to validate bonds which were invalid for the want of it; and, therefore, I think the judgments ought to be reversed.

These are, in general, the views I take of this case, and I am authorized to say that they are participated in by Justices Miller, Davis and Field.

NOTE.—Referring to the foregoing opinion of the court, the editor of the Chicago Legal News says (Vol. 9, p. 101): "This is one of the most remarkable opinions we ever published. The learned Chief Justice not only misstates the effect of the decisions of the supreme court of this state upon the question involved in the case, but the issue in the case." And severe as this criticism is, we are inclined to think it is just. It is very remarkable that, with the cases of Ryan v. Lynch, and Miller v. Goodwin before him, the learned Chief Justice should have made this statement: "While the supreme court of Illinois has not yet, as we understand, decided the precise question now before us, from an examination of its rulings in cases of a similar character, we think we may safely assume that, when called upon to do so, its judgment will not be in conflict with ours."

Ryan v. Lynch was a suit in equity, brought by tax-payers of the town of Ottawa against the collector, to restrain the collection of a tax to pay the interest on certain bonds issued by the corporate authorities of the town to the Ottawa, Oswego and Fox River Valley Railroad Company. The principal ground relied upon for the relief sought was, that the act of the General Assembly, under which the bonds were issued, was not enacted in conformity with the constitutional requirements. The points presented in the principal case were urged upon the court and seem to have been duly considered. In the course of the opinion the court said: "It is further argued by counsel, that the defendants in error, as residents and tax-payers of the town of Ottawa, are estopped from claiming that the bonds are void, because they have passed into the hands of innocent holders, and the town of Ottawa has paid interest upon them. If the bonds are voidable merely, this is true; but if they are absolutely void, it is not. If the bonds were issued without any power or authority in law, authorizing them to be issued, they are absolutely void; but if the legal power or authority to issue them existed, but was defectively or irregularly executed, they are only voidable, and an innocent and *bona fide* holder would be entitled to collect them. * * * * * In this case, the only power or authority in law, justifying the issuing of the bonds, is the act of the 18th of February, 1857, which we have seen was not read on three different days, nor was it passed by a vote by the ayes and noes in the Senate. * * * * The bill, therefore, never became a law, and the act conferred no power or authority whatever to issue the bonds. It was as completely a nullity, as if it had been the act or declaration of an unauthorized assemblage of individuals. Spangler v. Jacoby, 14 Ill. 298; The People v. Starne, 33 Ill. 121. It follows that the bonds were not merely voidable, but that they were absolutely void for the want of power or authority to issue them; and, in consequence, no subsequent act or recognition of their validity could so far give validity to them as to estop the tax-payers from denying their legality." And yet, in the face of this broad and emphatic language it is said that "it does not appear to have been suggested that, as against *bona fide* bondholders, the testimony to invalidate the statute was inadmissible."

Mr. Justice Bradley was well warranted in saying that a "similar result was never before reached in the history of our jurisprudence." What application has the doctrine of estoppels *in pais* to a case like this? It has none of the elements of an estoppel. A portion of the citizens of a municipality conceive that it would be to their advantage to devote a part of the substance of the property-owners of the municipality to the purchase of stock in a railroad company. It is assumed that a bare majority of those voting at an election held to determine whether the subscription shall be made, have the power to vote away not only their own but their neighbors' property; and believing this, the vote is taken, and a majority of those voting having voted in favor of the subscription, the bonds are issued and pass into the hands of the ever-innocent bondholder. In such a case it does not seem to be asking too much to require him who accepts an obligation so created to ascertain, at his peril, that the power existed both in law and in fact, which authorized the incumbrance of property with a debt, more or less onerous, against the will of the owner. Must the non-assenting tax-payer ransack the legislative journals and publish their contents to the bondholders whom he does not and can not know, in order to prevent an act, done against his will and without his consent, from rising up in judgment against him as an estoppel *in pais*? The Supreme Court of the United States has repeatedly held that a want of power to issue bonds would defeat them in any hands. The supreme court of Illinois, construing the constitution and laws of that state, had twice before the decision in the principal case was rendered, held the act of the General Assembly, which was relied upon as giving power to issue the bonds in controversy, unconstitutional, null and void; declaring that it conferred no power to issue bonds under any circumstances. This construction of the state statute was binding upon the federal courts. They had no more right to disregard it than they have to disregard a valid enactment of a state legislature. It is true that in this case the court professed to follow the Illinois decisions; but the foregoing extract from Ryan v. Lynch shows how widely it departed from them.

It seems to us that the learned Chief Justice also perverts the plain meaning of the language of Jervis, C. B., in Royal British Bank v. Tarquand. While it is true that it was there said that the parties were bound to read the statutes and deeds of settlement, and that they were bound to do no more, yet it can not be fairly claimed that it was meant to affirm that, having read the statutes and deeds, it was wholly unnecessary to ascertain that they were valid. That question was not before the court. It was simply held that, in dealing with an instrument appearing to have been regularly made under the statute and deeds referred to in that case, it might be presumed that the mere formalities prescribed thereby had been complied with. The regularity of the execution of a power, and not the existence of a power, was sought to be drawn in controversy. The same might be said of Jameson v. The People, cited in the principal case. It was there held that irregularities in the incorporation of a town could not be set up collaterally to defeat a corporate obligation.

If, as stated in the opinion of the majority of the court in the case under review, the question before the court was "not one of construction of laws and constitutions, but of evidence," the court, in view of its own previous decisions, might well have held that the evidence offered was properly rejected, on the ground that the existence of a law is not to be pleaded and proven; but then the court should have taken judicial notice that the act relied upon was never legally enacted, and that it was consequently a nullity. The court is bound to know the law without inquiry of the jury. The existence of a given law is always, in one sense, a fact to be determined by the court, and that

too upon legitimate evidence; as, for instance, the printed statute books which are generally made *prima facie* evidence that the laws appearing therein have been duly enacted. But it is not necessary to formally offer them in evidence, and the court will take judicial notice of any variance between the printed statute and the enrolled bill; and so where by law the record reaches back of the enrolled bill and embraces the legislative journals, the court will take judicial notice of them also. In the very nature of things, where the constitution requires certain steps to be taken before a bill can be enacted into a law, and requires that those steps shall be recorded in the legislative journals, the journals themselves are the best evidence that these steps have or have not been taken and recorded. All other evidence must be secondary. The printed statute is, *prima facie*, a transcript of the enrolled bill; but the court will look at the enrolled bill to ascertain the real fact. So, the certificate of the presiding officers of the two houses, together with the signature of the governor, approving a bill, are *prima facie* evidence that the bill was passed in a constitutional manner; but the court will inspect the record of the two houses and take judicial notice of the actual facts shown by that record. As to facts not required to be made to appear on the journals, the certificate of the proper officers is conclusive, with, perhaps, some unimportant exceptions.

The rule in such cases was well stated by Mr. Justice Miller in delivering the opinion of the court in Gardner v. The Collector, 6 Wall. 499: "We are of the opinion therefore, on principle as well as authority, that, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." In delivering the opinion of the court in The People v. Mahoney, 13 Mich. 492, Mr. Justice Cooley said: "As the court is bound judicially to take notice of what the law is, we have no doubt it is our right, as well our duty, to take notice not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requirements to the validity of a statute have been complied with. The printed statute is not *prima facie* valid when other records, of which the court must equally take notice, show that some constitutional formality is wanting. No plea is necessary to bring to the notice of the court facts which the judges must judicially know, and in respect to which no proof could be given." In Osburn v. Staley, 5 W. Va. 85, the court, after examining the authorities at length, said: "I conclude from these authorities, together with others examined and not named here, that, as the constitution requires each branch of the legislature to keep a journal, and provides that on the passage of every bill the vote shall be taken by yeas and nays, and be entered in the journal, and that no bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto, this court should look beyond the authentication of the act to the journal of the Senate, to see if the bill was passed by the required number of votes." The same rule was asserted in State v. Platt, 2 S. C. (N. S.) 150, and it was said: "When several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them should be admitted as conclusive proof of the performance of the others, is to say, in effect, that that one alone is really requisite." In Board of Supervisors v. Heenan, 2 Minn. 330, after referring to the provisions of the constitution of that state in regard to the passage of laws, the court said: "A similar provision is in the constitution of California, New Jersey, New York, Ohio, and, perhaps, other states; in some it has been held to be directory, in others essential. If it is only directory, it is senseless; but if it is held to mean what it imports, it is an advance in the science of government worthy of imitation by all states and countries whose legislatures are not absolute. When questions of this kind are presented, they must be tried by the court and never as a fact by a jury. The court may inspect the original bills on file with the secretary of state, and have recourse to the journals of the houses of the legislature to ascertain whether or not the law has received all the constitutional sanctions to its validity." And so it was held in Berry v. Balt., etc., R. Co., 41 Md. 446, where it was said: "This question has repeatedly arisen in several of the state courts of the highest authority, and in all cases, with but few exceptions, it has been held, that neither the printed statute book, nor the ordinary authentication of the statute after its passage, would preclude the inquiry into the fact whether the statute, as published, had in truth passed the legislature, and as evidence upon the question, the legislative journals and the bills, as acted upon by the legislative assemblies, have been consulted." Earlier cases in that court, seeming to assert a different rule, were qualified. In Burr v. Ross, 19 Ark. 250, the supreme court inspected the Senate journals and determined that a law printed in the statute books did not pass that branch of the general assembly, and that it was consequently inoperative. The question was apparently first raised in that court. The supreme court of Alabama held, in Jones v. Hutchinson, 43 Ala. 721, and in Moody v. State, 48 Ala. 115, that it was proper to inspect the legislative journals to ascertain whether a law, appearing in the statute book, was legally passed, and that the courts would take judicial notice of such journals. In the first case it was said: "It is undeniably true that a bill becomes a law *only* where it has gone through all the forms made necessary by the constitution to give it validity." In the latter case, after inspecting the journals, it was held that a bill signed by the presiding officers of the two houses and approved by the governor, and published in the session acts, "never acquired the force of law;" that it was, "as a law, wholly void, a mere nullity, and imposed no legal obligation on anybody." And this rule obtains in Ohio. Miller v. Gibson, 3 Oh. St. 475; Ohio v. Loomis, 5 Oh. 363; Fordyce v. Godman, 20 Oh. St. 1. And in New Hampshire: Opinion of the judges, 52 N. H. 662, affirming 35 N. H. 579.

"Each house keeps a journal of its proceedings which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void." Cooley's Const. Lim. 135. "It is settled that judges may, and, if they deem it necessary, should look beyond the printed statute book, and examine the original engrossed bills on file in the office of the secretary of state; and it seems that the journals of the two houses may be also consulted." Sedgw. Stat. & Const. Law, 2d Ed. § 55.

Eld v. Gorham, 20 Conn. 9, is generally cited as authority against going behind the enrolled bill; but it was held in that case, that even the original enrolled bills could not be consulted, and, by a very forced construction of a statute, the certificate of the secretary of state was held to be conclusive. But it was said "that it is competent for the legislature to prescribe what shall constitute a record of their proceedings, the manner in which it shall be made, and the effect thereof admits of no question. * * * * And, it being a record of the statutes of the state, courts are bound judicially to take notice of their statutes; not because it is the prerogative of courts arbitrarily to determine what are the public statutes of the state, nor because they are required or supposed to have a knowledge of those laws, without any evidence of them, but because they have the means, and it is their duty to make themselves acquainted with the records of the legislature, which are in their nature not only conclusive evidence, but the only original evidence of those laws." This is the doctrine that we contend for. Here the revising committee had collected the statutes of Connecticut, and the legislature had confirmed their work and declared the compilation to be the public statute laws, and, with certain exceptions, the only public statute laws of the state. And the secretary of state was made the custodian of the revision, and was required to affix his certificate thereto, that it contained the statute laws of the state. The question was, whether the courts would go back of the action of the revisers, as certified by the secretary of state, to see whether a given law was, or was not, repealed. It was held, on the ground indicated above, that it could not be done. But all that we claim is, the courts will take judicial notice of the record proper, whether made such by constitutional or legislative enactment. Two of the judges doubted whether the proper construction was given to the act adopting the revision and providing for its promulgation. Two Iowa cases, Clare v. State, 5 Iowa, 509, and Duncombe v. Prindle, 12 *Id.* 1, are also generally cited as holding that the legislative journals can not be resorted to, to contradict the enrolled bill; but they do not touch that question. They are simply

authority for impeaching the published statute by the enrolled bill, which is very properly held to be better evidence than that which only purports to be a printed copy of it. The propriety of resorting to the legislative journals was not presented or passed on in either case. The right to impeach the enrolled bill by showing from the legislative journals, that the yeas and nays were not called, seems to be conceded in City of Watertown v. Cady, 20 Wis. 501.

In Douglass v. Bank of Mo., 1 Mo. 24, it was contended that the bank was not legally incorporated, because the law, under which it was organized, had not been signed by the president of the legislative council, as the joint rules of the two houses required. It was contended that the signature of the presiding officers was necessary to show that the bill had been duly acted upon and passed by the general assembly. The court answered that, conceding that it would tend to show that fact, "*yet the journal must be better and higher testimony;*" and, the journals showing that the bill had been regularly passed, it was held to be a valid law without the signature of the president of the council. In this case a part of the journal was preserved in the bill of exceptions, and the court inspected the journal as to other facts. In the subsequent case of State v. McBride, 4 Mo. 303, the supposed defects in the record were raised on demurrer, and it was contended by the attorney-general that the court could not go back of the enrollment, and that, if it could do so in any case, an issue raising the question must be regularly framed; but the court held otherwise, and took judicial notice of the journals. In Pacific R. R. v. The Governor, 23 Mo. 353, a different rule was asserted as to certain alleged irregularities in the passage of a bill over the governor's veto. A majority of the court held that the constitution did not expressly require a journal to be kept, and that the provisions of the constitution as to the formalities, which it was claimed had not been observed, was directory merely. But the court said: "We do not maintain that the legislature can prevent a scrutiny into its acts, which the constitution designed should be made, by any mode of authentication it may adopt." In Bradley v. West, 60 Mo. 33, it was sought to impeach the validity of the limitation law by showing by the printed journals, for the first time in that court, that the bill was not passed by the requisite constitutional majority; but the court held that, insomuch as the question had not been raised in the trial court, the journals could not be inspected for the first time in the appellate court, on the ground that the printed journals were only *prima facie* evidence of what they contain. It was said that, to permit their introduction for the first time in the Supreme Court, would prevent the opposite party from showing that they were not in accordance with the original legislative rolls; but that objection does not seem to be tenable. The same objection might be raised to the citation of the printed statutes. The journals are declared to be *prima facie* evidence to the same extent that duly authenticated copies of the original would be. They are duly authenticated copies of the original rolls, just as the printed statute is a duly authenticated copy of the original enrolled bills. If the court may go behind the printed statute and inspect the enrolled bills, it may, with equal propriety, go behind the printed journals and inspect the original legislative rolls. And, where it inspects a copy of the record, it would certainly not be precluded from going further and inspecting the record itself, if necessary. It takes judicial notice, not of authenticated copies of the record, but of the record itself, and will take any steps necessary to ascertain what that record contains.

The course of decisions on this question in New York does not run entirely smooth. In Thomas v. Dakin, 22 Wend. 9 it was conceded by both sides at the bar that the objection must be raised by plea, and two of the judges who delivered opinions favored that view; but the question was not passed upon by the court. In Warner v. Beers, 23 Wend. 103, various opinions were expressed on this subject; but it was not passed upon by the court. The president of the senate and Senator Verplanck were of the opinion that, in respect to bills required to be passed by a two-thirds majority, inquiry might be made into the number of votes given for them; but they denied that such inquiry could be made by a jury, holding that the court must inspect the legislative record. The chancellor thought the objection must be raised by plea. Senator Root held that the objection was properly raised by demurrer, on the ground that *nul tiel record* could not be pleaded against a public statute. He contended that it was the duty of the court to inspect the legislative journals, to determine whether constitutional requirements, in the passage of the law, had been complied with. In Hunt v. Van Alstyne, 25 Wend. 605, there was a special plea that the act there in question was not passed by a constitutional majority; but, the suit being in the name of the president of the bank, and the declaration containing common counts, it was held that the plea was bad.

In People v. Purdy, 2 Hill, Mr. Justice Bronson inspected the legislative journals, as well as the certificate of the presiding officers of the two houses, and held that the bill had not been passed by a two-thirds majority. The other judges held that a majority vote was sufficient to pass the bill. On appeal to the court of errors (4 Hill. 390), the judgment was reversed, and the position of Judge Bronson sustained, by a vote of 13 to 11. Afterwards, in delivering the opinion of the court in De Bow v. The People, 1 Denio, 11, Bronson, Ch. J., said. "It is now well settled that it is the business of the court to determine what is statute, as well as common law; and, for that purpose, the judges may and should, if necessary, look beyond the printed statute-book, and examine the original engrossed bills on file in the office of the secretary of state; and it seems that the journals kept by the two houses may also be consulted." This last case was approved in Commercial Bank v. Sparrow, 2 Denio, 97. In The People v. Supervisors, 8 N. Y. 317, it was urged against the act then in question that, on the final passage, the ayes and noes were not taken; that the ayes and noes were not entered on the journal, and that three-fifths of the members elected were not present at its passage. The court held that, as the pleadings did not distinctly allege these defects in the mode of the passage of the bill, they could not be raised. But the case seems to be full authority for the judicial inspection of legislative journals, nevertheless; for the court in this case, notwithstanding the supposed defects in the pleadings, did inspect the journals, and found that the action of the legislature was formal in every particular, and that the requisite number of members were present when it was put on its final passage. It was further held that the court could go behind the certificate of the presiding officer, and show that the requisite number of members were or were not present on the passage of a bill, and that this might "be shown from the journals or other evidence of an equally satisfactory character." The provision that the ayes and noes should be entered on the journal on the final passage of a bill, was held to be directory merely. In The People v. Devlin, 33 N. Y. 269, it was declared that the legislative journals were not legitimate evidence to impeach a public statute, and this remarkable assertion was made: "To impeach the force and effect of a solemn statute duly certified, *no authority can be found within the limits of my research to admit them to be legitimate evidence*; but much authority may be found to the contrary." Which only proves, the research must have been very limited. In The People v. Commissioners, 54 N. Y. 276, it was held that no issue could be framed upon an allegation as to the existence of a law, and that, "when it is necessary to inquire by what vote a law was, the judges are to determine from the printed statutes, or from the laws on file in the secretary of state's office, whether the requisite vote was received," and that, "upon such inquiry the printed volume is presumptively correct, and the original act is conclusive." And, to the same effect see State v. Young, 32 N. J. L. 29; Green v. Weller, 32 Miss. 685; Broadnax v. Groom, 64 N. C.; Lottery Co. v. Richoux, 23 La. Ann. 743; Whited v. Lewis, 25 La. Ann, 568; Evans v. Brown, 30 Ind. 514 (overruling Skinner v. Deming, 2 Carter, 558; Coleman v. Dobbins, 8 Ind. 156); Blessing v. Galveston, 42 Tex. 641; Sherman v. Story, 30 Cal. 253; Swan v. Buck, 40 Miss. 268; Speer v. Plank Road Co., 22 Penn. St. 376.

It will be seen that the authorities are nearly uniform in holding that the court must take judicial notice of public laws, and that no issue of fact can be made up and tried as to their existence. Indeed, the supreme court of Illinois seems to be the only one that now adheres to the doctrine that the existence of a law, when drawn in question, is a fact to be put in issue and tried like any other fact; and this doctrine is comparatively new, even in Illinois, having been first announced in Ill. Cent. R. R. v. Wren, 43 Ill. 77, where it was said: "If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of legislative journals, and introduce that proof into the record." While it is true that in all, or nearly all, of the preceding cases in that court, in which this question was presented, the objection was made in the

court below, and, in many of them, parts of the journal were preserved in the record, yet it was nowhere intimated that such a course was necessary, and the court almost uniformly went outside of the record and inspected the legislative proceedings. See People v. Campbell, 3 Gilm. 466; Spangler v. Jacoby, 14 Ill. 297 (where the cases of State v. McBride, 4 Mo. 303; Green v. Graves, 1 Doug. (Mich.), were cited with approval); Turley v. County of Logan, 17 Ill. 151; Prescott v. Board of Trustees, 19 Ill. 324, where, referring to the act in controversy, the court said: "Such an act is to be found in the statute-book; but in reality there is no such law in existence, and never has been. *Its history is correctly stated in the agreed case, as we have ascertained by a careful examination, not only of the printed journal, but of the original manuscript-journal of the session of* 1851." In People v. Starne, 35 Ill. 121, the right to inspect the record was asserted, and numerous cases where the same doctrine was laid down, were cited with approval. And, referring to the remark in Eld v. Gorham, 20 Conn. 9, that the inspection of the journal would be exceedingly inconvenient, from a want of access to those sources of information, the court clearly indicates that, though inconvenient, the inspection would be made in a proper case. The rule announced in R. R. Co. v. Wren, *supra*, has been adhered to in subsequent cases. Grob v. Cushman, 45 Ill. 124; People v. De Wolf, 62 Ill. 253. M. A. L.

CORRESPONDENCE.

USURY LAW IN NEW YORK.

To the Editor of the Central Law Journal:

A few days since a petition, signed by names representing several hundred millions of capital, was presented in the Assembly at Albany by a merchant of New York City, a venerable member of the legislature, asking for the repeal of the usury laws, so far at least as they work a forfeiture of the debt or loan, and to substitute therefor a provision that the excess over the legal rate of interest "may be recovered from the person or corporation so taking or receiving the same; provided that such action is commenced within two years from the time the excess in said transaction occurred." Several attempts during the past ten years have been made to repeal or modify the New York usury laws, but in vain. We have always taken strenuous grounds against this law; and when the question was under discussion in New York, and in some other states, in 1870, we expressed our views at great length in a lecture delivered in May of that year before the Brooklyn Law Club. At that time we reviewed the law of usury from the first act under Henry VII. (1488), down to the statute of New York, and the working of the system. We have ever held to the opinion that, in this age of large dealings, of changing commodities, money is as much a merchantable article as silks, or dry goods, and that being the case, it is worth what it will bring. It does, and always will find its level, financially speaking, like butter or cheese. Usury, as such, is simply a relic of the past ages, and retards and damages, in a large measure, the business-thrift at the present day, particularly where a law like that of New York prevails.

The essence of the contract of bottomry and respondentia is, that the lender takes the risk, and is thus entitled to the marine interest. This commercial usage is sanctioned by the custom or law of most every country. There is, it will be observed, a distinction made between such cases and those of personal risk, of the debtors being able to pay; if anything be paid for such risk, it is usurious; and yet, where pecuniary risk is taken in loans, it might excite wonder in the minds of the curious to know wherein the metaphysical scissors of the upholder of this law could be inserted to demonstrate the difference, in fact, between the risk taken by the one and the other. Under the common law, and in the age when nothing was considered honorable but the plow and the sword, it may be readily imagined how thoroughly the popular mind became imbued with the sentiment, that usury was a mortal sin. The supposed policy of the usury laws, in modern times, is to protect necessity against avarice; and Dr. Adam Smith somewhere observes that, if the legal rate of interest be fixed at a high rate, the greater portion of the money of the country would be lent to prodigals.

With respect to the efficacy of protecting men against themselves in such matters, however desirable the system may be, it is impracticable, unless by placing the parties under the guardianship of friends; and we submit that those who need this kind of protection are very few; and as to Dr. Smith's theory, we would answer that the moneyed man would never lend his wealth to prodigals without ample security for the payment; nor would the prodigal be likely to pay exorbitant rates when the desired funds could be procured at a lower price. Money will always find its level, like other commodities. Those who will consider things beyond their names, will find that money, as well as all other commodities, is liable to the same change and inequality, and the rate of money is no more capable of being regulated than the price of land; because, says our able commentator, in addition to the quick changes that happen in trade, this too must be added, that money may be carried in or out of the country, while land can not. And Jeremy Bentham declares, that the idea of fixing one rate of interest for every kind of security is as absurd, as if the law were to fix the same price for all horses.

In 1816 Lord Brougham enunciated the principle that the repeal of all usury laws was a measure perfectly safe, and calculated to afford the greatest measure of relief, and innoxious to the borrower, the lender, and to the state. As early as 1834, in Massachusetts, a statutory modification of the usury law of that state was effected. In New York, it seems eminently desirable that some reform be inaugurated, if not by a total abolition of the whole law of usury, at least as far as to eradicate the clause whereby a forfeiture of the principal sum may result from taking more than seven per *centum* interest. But four or five states have the same laws as that of New York; New Jersey, North Carolina, Virginia and Florida, we believe, are among the number.

In New York, instead of growing more liberal and advanced on this question, as long ago as 1837, the legislature of that state passed the present law, which is far more rigorous and severe than the law which existed prior to that date. The defence of usury is, and has for twenty-five years been, considered unconscionable by the courts, and fortunes are yearly made by violating the law. In Curtis v. Leavitt, 15, N. Y. 151, Brown, J., declares usury law to be a "barbarous act," unworthy the age and country where it is found. In the following cases may be found many questions of importance. Stores v. Coe, 11 Barb. 80; Condit v. Baldwin, 21 N. Y. 219; Marvine v. Hymers, 12 N. Y. 223; Heath v. Cook, 7 Allen, 59; Nichols v. Fearson, 7 Peters, 103; The National Bank of the Metropolis v. Orenth, 48 Barb.

The statutes of some of the states have wisely provided that a greater rate than simple interest may be recovered if specified in writing, as in Michigan and Illinois, which rule seems far more advantageous to trade than that of New York. Such a reform in the latter state would, without doubt, work beneficent results, as the community, commercial men and the courts would then respect and uphold the law; and, as we believe with Bacon, it is wiser to mitigate usury by declaration than to suffer it to rage by connivance. We would like, and hope to see, echoed from the West,

through the columns of this Journal at least, the practicability and desirability of a radical reform on this general question.

New York City. JOHN F. BAKER.

BOOK NOTICES.

BAKER'S SUPPLEMENT.—Supplement to Riddle's Treatise on the Law and Practice of Supplementary Proceedings; Adapted for Use in all the States and Territories. By JOHN F. BAKER, author of a "Treatise on the Law of Manufacturing Corporations," etc. New York: Diossy & Company. 1877.

This is a small, but useful, treatise of over one hundred pages, and has been compiled for the purpose of setting forth the changes in the laws and decisions of the courts in the different states, since the appearance of Mr. Riddle's work in 1866. The lapse of a decade has wrought considerable change in this branch of the law, and the present compilation will be of value to the profession, second only to what a revision of the larger work would have been. The practice in supplementary proceedings in New York is treated of, for the most part, by the author; still, the references to the decisions under the statutes of the other states make the work of more than local value. So far as the body of the book is concerned, it has been prepared with care and judgment; but the author appears to have left the making of the index and table of contents to some subordinate, whose incapacity is too glaring to be overlooked. For example, under section 2, which is entitled "When a watch can not be taken in supplementary proceedings," the rather extraneous subjects of taxes, earnings, moneys received after injunction, funds reached through equity, and damages for levying on exempted property, appear to be considered.

TEXAS REPORTS, VOL. 44.—Cases argued and determined in the Supreme Court of the State of Texas during the latter part of the Tyler Term, 1875, and the first part of the Galveston Term, 1876. Reported by TERRELL & WALKER. Vol. 44. Houston, Texas: E. H. Cushing, Publisher. 1876.

The decisions here presented were rendered in the supreme court of the state of Texas, prior to the adoption of the constitution of April 18, 1876, when that court was the court of last resort for the state, having both civil and criminal jurisdiction. The court, as constituted then, consisted of five judges—Hon. O. M. Roberts, Chief Justice, and Hon. R. A. Reeves, Hon. George F. Moore, Hon. Robert S. Gould, and Hon. John Ireland, Associate Justices. Out of this court, by the new constitution, were created two courts, called the Supreme Court and the Court of Appeals, and having exclusive appellative jurisdiction of civil and criminal cases respectively. The former chief justice, and Judges Moore and Gould, form the new Supreme Court, the Court of Appeals being composed of Hon. M. D. Ector, chief justice, and John P. White and C. M. Winckler, associate justices. The present volume contains over seven hundred pages, and nearly three hundred cases are reported in full. Five former decisions are expressly overruled, viz.: Gault v. Goldthwaite, 34 Tex. 104; Herrington v. Williams, 31 Tex. 417; Murray v. The State, 34 Tex. 341; Warren v. Wallis, 38 Tex. 22; and Taylor v. Bonner, 38 Tex. 537. Six prior adjudications are modified, and two cases re-affirmed. The book is well bound, and the cases well edited, but the paper is bad and the printing still worse. Among the leading cases are the following:

CUMULATIVE PUNISHMENT—*Prince v. The State*, p. 480.—Opinion by REEVES, J. In Texas, the courts have no authority to fix the commencement of a term in the penitentiary at the expiration of another term. Courts of the highest authority have differed on the question as to whether one term of imprisonment was to commence on the termination of the punishment on another charge; or whether the terms should commence from the judgment and sentence of conviction and run concurrently. The former is maintained in Connecticut, Pennsylvania, Massachusetts and California, and, perhaps, other States. State v. Smith, 5 Day, 175; Mills v. The Commonwealth, 13 Penn St. 631; Kite v. The Commonwealth, 11 Met. 581; The People v. Forbes, 22 Cal. 135. On the contrary, it was held by the supreme court of Indiana, in Miller v. Allen, 11 Ind., 389, that, in the absence of a statutory provision authorizing it to be done, the court had no power to order a term of imprisonment in the penitentiary to commence at a future period of time. The revised statutes of New York, as cited by the supreme court of California, in People v. Forbes, 22 Cal. 135, provide that, in case of two or more convictions before sentence on either, the term of imprisonment upon the second or subsequent conviction shall commence at the termination of the previous term of imprisonment. The criminal code of Kentucky contains substantially the same provisions. Before the Kentucky code was adopted, the court of appeals of that state held that the court had no power, independently of a statute, to make one term of imprisonment commence at the expiration of another. James v. Ward, 2 Met. (Ky.) 271. In that case the court, referring to the cases at common law, where the prisoner was sentenced to several terms of imprisonment, one to commence at the conclusion of another, said: "But it may be remembered that, in all these cases, the punishment by imprisonment was by law, at the discretion of the court. The time that the prisoner was to be confined was not determined by the jury; but upon his being found guilty of the offenses contained in the indictment, his punishment was discretionary with the court, and the term of his imprisonment was fixed by it. The court having the power to prescribe the length of time the imprisonment was to continue, might sentence the prisoner to several terms of imprisonment in succession, (where he was charged with several offenses), because it could inflict the same amount of punishment upon him in each case separately." See Rex v. Wilkes, 3 Burr. 325. The correct rule in the opinion of this court is that enunciated by the courts of Indiana and Kentucky in the cases referred to.

WHAT AMOUNTS TO AN ASSAULT—*McKay v. The State*, p. 43.—Opinion by ROBERTS, C. J. Under the Texas code the pointing by one person of an unloaded pistol at another within shooting distance, accompanied with an order to kneel down, which, through fear, is obeyed, does not amount to an assault. It was contended that the mere pointing of a pistol did not constitute an offense; but, if it is pointed and accompanied by acts and threats that caused feelings of constraint, shame, etc., then an injury is inflicted, and the offense becomes complete. This construction, it was argued, is in harmony with the authorities of other states, which seem to hold that there must be some adaptation of the means to the end, and it is enough if this adaptation be apparent, so as to impress or alarm a person of ordinary reason. 2 Whar. C. L., secs. 1,244, 2,694; Kemble v. State, 32 Ind. 220; Mullin v. State, 45 Ala. 43; Taver v. State, 43 Ala. 354; Johnson v. State, 26 Ga. 611; Allen v. State, 28 Ga. 395; Com. v. McDonald, 5 Cush. 365; State v. Rawles, 65 N. C. 334. In Tennessee and Iowa it is expressly held that pointing an unloaded gun at a party is an assault. State v. Smith, 2 Humph. 457; State v. Shepherd, 10 Ia. 126. The English authorities are not uniform. In 1840, Parke, B., intimated that pointing an unloaded gun was an assault. Rex v. George, 9 C. & C. 483, 38 Eng. C. L. R. 288. During the same year, a contrary ruling was made in a civil action. Blake v. Bernard, 38 Eng. C. L. 315. In 1843, a doubt was expressed upon the point, R. v. Baker, 47 Eng. C. 253, and in 1844, Tindall, C. J., held directly that it is an assault only when the pistol pointed is loaded. R. v. June, 47 Eng. C. L. 529. Mr. Wharton, in the first edition of his work on Criminal Law, lays down the rule one way, 10 Iowa, 130, and, in his seventh edition, the other way. Whart. C. L., sec. 1,244, 7th ed. There is a marked difference between the legal injury resulting from the act and intent of the assailant in the attempt to commit a battery, and in the actual injury of shame and fear in the mind of the assailed, that may have been intended and produced by the act of the assailant. To effect the legal injury indictable

as an assault, the assailant must have the ability to commit a battery by physical violence on the person by the means used.

MARRIAGE —DURESS.—*Johns v. Johns*, p. 40.— Opinion by REEVES, J. A marriage consummated while the man is under arrest for seducing the woman, and on the advice of the officers of the law and bystanders that, by marrying, the party under arrest would be released from further prosecution, is valid, and can not be avoided under such circumstances ou the ground of duress.

ARREST—SELF-DEFENSE—KILLING POLICEMAN.—*Tiner v. The State*, p. 128.—Opinion by GOULD, J. A party guilty of a misdemeanor and fired on by a policeman while avoiding arrest, may repel such attack in self-defense by returning the fire, and if in so doing he kill the policeman, such killing would not necessarily be unlawful. Although it is true that it is the duty of every citizen to submit to lawful arrest, there is a broad distinction between resistance and avoidance—between forcible opposition to arrest and merely fleeing from it. State v. Anderson, I Hill (S. C.), 346. There is no rule of law that he who flees from attempted arrest in cases of misdemeanor, thereby forfeits his right to defend his life. It is certainly possible for the officer to commit a felony by shooting at a man, or by other excessive violence, even when attempting his arrest. Caldwell v. State, 41 Tex. 86. And it would follow that the party thus feloniously assaulted might defend his life. State v. Oliver, 2 Houst. (Del.) 605, referred to in Horrigan and Thompson's Cases on Self-Defense, p. 716. While it is the duty of the officer attempting to arrest to make known his purpose and the capacity in which he acts, if that purpose and capacity are known to the party when arrest is attempted, and the arrest is otherwise lawful, submission to the arrest becomes a duty, and resistance is unjustifiable. State v. Anderson, *supra*. Rosc. on Ev. 755.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

CIVIL PRACTICE— INSTRUCTIONS BASED UPON EVIDENCE.—Where there was an indebtedness from individual members of a firm to a third person, which was to be balanced by indebtedness from such third person to said firm, which settlement left a balance due said firm, and there was a subsequent failure and assignment of said firm, and suit by the assignee on the account, an instruction to the jury that, if they found from the evidence that defendant was a creditor of the members of said firm, or either of them, at the date of said assignment, the plaintiff could not recover, was not warranted by the evidence, and giving it was error. Judgment reversed. Opinion by BAKEWELL, J.—*Finney v. Franklin.*

MOTION TO SET ASIDE NONSUIT — DISCRETION OF TRIAL-COURT.—When the court below overrules a motion to set aside a nonsuit, which motion is based upon the ground that plaintiff, who suffered the nonsuit, was misled and deceived by the misrepresentations of a witness, by whom he expected to establish facts material to his case, and it appears from the record that the trial-court exercised a fair discretion in overruling such motion, its action will not be reversed by the appellate court—especially when plaintiff offered no evidence tending to show that he was entitled to maintain an action as the owner of the notes sued on. Judgment affirmed. Opinion by HAYDEN, J.—*Merrill et al. v. Sullivan et al.*

HOMESTEADS.—Our homestead act gives to the widow a fee-simple absolute in the homestead of which the husband died seized in fee, not to exceed eighteen square rods, or the value of $3,000, in cities having a population of 40,000 or more. *[Citing, Wag. St. pp. 697–8, §§ 1-5; Skouten v. Wood, 57 Mo. 380]. The fact that by § 5, Wag. St. 539, the widow is entitled to one-half the real and personal estate belonging to the husband at the time of his death, and that the half of the personalty exceeds the amount allowed for homestead, does not deprive her of her homestead right. Renting out rooms in the homestead does not affect the question. [Citing Deere v. Chapman, 25 Ill. 610; Lazell v. Lazell, 8 Allen, 575; Mercier v. Chace, 11 Allen, 194]. Judgment affirmed. Opinion by BAKEWELL, J,—*Albrecht v. Imbs.*

JUDGMENT AN ENTIRETY—AGAINST MARRIED WOMAN VOID—MAY BE QUESTIONED COLLATERALLY—EXPIRATION OF EXECUTIONS—REVIVAL OF JUDGMENTS — POSSESSION OF PERSONAL PROPERTY.—A judgment is an entirety, and, when against several defendants, must be good as to all, or void as to all. A judgment is in the nature of a contract—is a specialty—and creates a debt—must be taken against one capable of contracting a debt. Judgment against a married woman is void. [Citing Griffith v. Clark, 18 Md. 460; Moore v. Tappan, 3 Gray, 411; Higgins v. Peltzer, 49 Mo 135.] A void judgment can be questioned collatively, and an execution on such judgment can not authorize a seizure by the officers. [Citing Howard v. Clark, 43 Mo. 344.] An execution expires on the return-day, and in order to be renewed, the indorsement of renewal by the justice must be dated. [Citing Wag. St. 841, § 7.] A constable seizing property by authority of a dead execution, under a void judgment, is not entitled to possession even as against a *bona fide* purchaser at a sale under a void execution, when such purchaser is in possession. Judgment affirmed. Opinion by BAKEWELL, J.—*Dicker v. Lidwell.*

CONSTITUTIONAL LAW—PERPETUATION OF EVIDENCE OF TITLE—CONSTRUCTION OF STATUTE—ACT OF MARCH 28, 1873.—"An act to establish evidence of title to real property, to restore the records of the same, and to provide for the recording of deeds," approved March 28, 1873, providing that any person claiming an estate or interest in real estate, whose deeds have been lost or destroyed, may apply by petition to the circuit court of the proper county, describing his lands, the nature of his interest therein, and the lost deeds, setting forth the manner in which his deeds were lost or destroyed, praying the court to hear and make record of such evidence as the said petitioner shall produce concerning his alleged interest in said land, and providing for an adjudication of the title according to the evidence so adduced, instead of making a record of such testimony, is in conflict with section 32, article IV of the Constitution of 1865, which declares that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but, if any subject embraced in the act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." The act is in violation of the constitutional provision in every aspect. It omits from the title the chief object of the statute, and excludes from the body the purpose most conspicuously displayed in the title. The act is void in so far as it provides for proceedings which are to end in final judgment. The petition is under this act, and prays for a decree of title to the lands described. The parties summoned, on appearing, demurred, for the reason that petition did not state facts sufficient to constitute a cause of action. Demurrer sustained. Judgment affirmed. Opinion by LEWIS, C. J.—*In re Goode.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON,
" JOHN W. HENRY,

APPEAL—FINAL JUDGMENT.—When the transcript fails to show a final judgmeut in the court below, the writ must be dismissed.—*McCoy v. Davidson.*

ACTION ON A SPECIAL TAX-BILL.—Although a special tax-bill may include items for which the party or property charged may not be liable, such an error does not invalidate the whole tax-bill so as to preclude a recovery for what is properly chargeable against the person or property. [Newman v. Smith, 60 Mo. 292].—*The First Nat. Bank v. Amaldia.*

PARTNERSHIP—SECURITIES.—A and B were partners in a sewing-machine agency, and B sold out to C, taking C's obligation to liquidate the debts of the firm of A and B.

The new firm of A and C made a bond, with security, to the sewing-machine company, to pay all the debts of the new firm then existing, or thereafter to accrue. *Held*, that the two obligations could not be so construed as to bind A and C and their securities for the payment of the debts of the old firm of A and B.—*Cochran et al. v. Stewart & Hart.*

UNLAWFULLY DEALING IN EXCHANGE—DEFENSE—VENUE.—It is no defense to an indictment for dealing in bills of exchange, etc. (§ 1, p. 247, 1 Wag. St.), that the defendant had made due application for license, and had tendered to the collector the requisite sum of money, and that the officer refused to issue the license, in violation of his official duty. State v. Jamison, 23 Mo. 330. Where, upon indictment, the evidence adduced at the trial fails to show in what county the offense was committed, the judgment of conviction will be reversed and the cause remanded.—*State v. Myers.*

EFFECT OF DEMURRER TO EVIDENCE.—A demurrer to the evidence admits everything which the testimony tends to prove, even in a slight degree, and the court will make every inference of fact in favor of the party who offers the testimony. The legal effect of papers is a question for the court; but when documents are offered in evidence as the foundation of an inference of fact, whether the papers authorize the inference sought to be drawn from them, is a question of fact for the jury, and documents offered for such a purpose stand on the same ground with mere letters, or written correspondence. [Prim v. Haven, 27 Mo. 205].—*Wilson v. Board of Education.*

TRANSCRIPTS OF JUSTICES—POWER TO AMEND.—Upon a rule granted requiring a justice of the peace to return an amended transcript, it is the duty of the justice to send up a faithful transcript of all the entries on his docket; but, after the day for entering up judgment has passed, the justice has no power to amend or alter any of his docket entries in making return under the rule. The court says: "It would be an exceedingly dangerous practice to permit justices of the peace to make *nunc pro tunc* entries on their dockets." [People v. Del. Com. Pleas, 18 Wend. 558; Watson v. Davis, 19 Wend. 371; Burton v. McGregor *et al.*, 4 Ind. 550; Young v. Rummell, 5 Hill, 60].—*Norton v. Murphy.*

ESTATE DESTROYED BY OPERATION OF LAW.—A had a life-estate in certain slaves, under a will which gave the remainder to B. B brought suit in the circuit court to restrain A from selling the slaves, or his estate in them, and a decree was made that A might sell, upon giving bond and security for the payment of the value of the slaves to B, whenever (as both the decree and the bond express it) "the right of A should cease to exist in such slaves, and B shall be entitled thereto." Before the death of A, slavery was abolished by the act of the government. *Held*, that while equity regards the person holding the life-estate as trustee for the remainder-man, there could be no breach of trust by the sale made by decree of a court of competent jurisdiction, and that the whole estate having been destroyed by operation of law before the death of A, B never became entitled to the slaves, and can not recover the value of them.—*McCormick v. Kirby et al.*

ABSTRACT OF DECISIONS OF THE SUPREME COURT OF ILLINOIS.

January Term, 1877.

[Filed at Ottawa, Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY, } Associate Justices.

CONTRACT—RIGHT TO RECOVER FOR SERVICES.—A party can not recover for services performed under a special contract, when the evidence fails to show a performance of the contract on his part, or that he was prevented from performing by the other party. Opinion by BREESE, J.—*Knickerbocker Ins. Co. v. Seeleman.*

REMEDY—NEGLECT TO OPEN STREET IN REASONABLE TIME.—An action of assumpsit does not lie against a city by a party whose land has been condemned by the city for the extension and opening of a street, to recover special damages in being deprived of the beneficial use of the land not taken. If the city improperly neglects to open the street within a reasonable time, not having abandoned it, *mandamus* is the proper remedy. Opinion by SHELDON, C., J.—*Webster v. City of Chicago.*

MECHANICS' LIEN OF SUB-CONTRACTOR.—If a party furnishing labor or materials to a contractor, for the erection of a building, desires to enforce a lien under the act of 1869, he must give notice to the owner in twenty days from the completion of his contract, or in twenty days after payment should have been made, and then he can recover no greater sum than is due from the owner to the original contractor. Opinion by BREESE, J.—*Metz v. Lowell et al.*

PRACTICE—JUDGMENT FOR BALANCE ON AFFIDAVIT OF MERITS BY DEFENDANT AS TO PART.—If a defendant in a case, where he is required to accompany his pleas with an affidavit of merits, files with his pleas an affidavit that he has a good defense as to $40 of the plaintiff's demand, the latter may concede the defense as to such sum, and will then be entitled to judgment for the residue without any trial, regardless of pleas to the whole cause of action. Opinion by CRAIG, J.—*Henry v. Meriam & Morgan Paraffine Co.*

PROMISSORY NOTE—MERGER IN JUDGMENT—WHEN VOID JUDGMENT ADMISSIBLE AS EVIDENCE.—1. After judgment upon a promissory note, the note is no longer a subsisting cause of action, but is merged in the judgment; but this is not so, if the judgment is void. 2. When the plaintiff declares upon a promissory note and upon a judgment, and it is proved by parol that the note is satisfied by a judgment thereon, a transcript of the judgment is admissible in evidence, although the judgment is void for want of a sufficient service, as showing the note is still a valid and subsisting obligation. Opinion by DICKEY, J.—*Richardson v. Aikin.*

MECHANICS' LIEN—GENERAL DECREE AUTHORIZED BY STIPULATION.—When, during the pendency of a petition for a mechanic's lien, the defendants gave their notes for the sum due, and a stipulation that, in case of default of "payment of said notes, or either of them, according to the terms thereof, then after twenty-four hours' written notice," the complainant should be authorized to enter their default, and have a decree for the whole amount of both notes, with interest, and that immediate execution might issue thereon, it was *held* that this authorized a general decree in case of default, and did not require the decree to be special, as in ordinary cases. Opinion by CRAIG, J.—*Johnson v. Eastabrook.*

CONTRACT—TERMINATION—ILLEGAL CONSIDERATION.—1. A contract made by a confidential agent and adviser of his principal, by which he is to induce them to discharge their present attorney and employ another, who, in consideration thereof, agrees to pay the agent one-half of his fees, is illegal, and can not be enforced by the agent, either at law or in equity. 2. If a real-estate agent of parties at a distance procures his principal to employ an attorney to be associated with him in their business, under an agreement with the attorney to divide fees, the contract is in the nature of a partnership, and is terminated when the agent is discharged by his principal; and he can not thereafter claim any share in fees received by the attorney for services subsequently performed for the principal. Opinion by CRAIG, J.—*Byrd v. Hughes.*

NEGLIGENCE—FAILURE TO LIGHT STREETS BY CITY—INSTRUCTIONS.—1. The failure of a city to avail itself of a power to light its streets can not be regarded as negligence, in an action brought by a person who receives injury by falling into an excavation in the sidewalk or street in the night-time. 2. If a city, however, assumes to light a street or bridge, under a discretionary power, and does it in such a negligent manner as not to afford proper security from danger, and a person is injured by falling into an excavation in the night-time, the omission may be shown on the question of negligence. 3. An instruction should be so drawn as not to be of doubtful or uncertain meaning, as otherwise the jury may be misled by it. 4. An instruction that the jury should give the plaintiff such compensation as they can under their oath say will be a fair one, in case of a finding in his favor, is erroneous, in not confining their finding of damages to those shown by the evidence. Opinion by CRAIG, J. —*City of Freeport v. Isbell.*

CRIMINAL LAW—CONVICTION OF A LESS OFFENSE THAN CHARGED—FORMER ACQUITTAL—EVIDENCE.—1. The rule that a defendant in a criminal case may be convicted of a lesser offense than that for which he is charged and tried, applies only when the lesser offense is included in the higher one. If it is not a constituent element in the higher crime charged, no such conviction can be had. 2. The offense of which an accessory after the fact may be guilty, is not included in, nor has it any connection with the principal crime. The one can not be committed until the principal offense is an accomplished fact. Therefore, one indicted for larceny can not be convicted of being an accessory after the fact. 3. The acquittal of a party indicted as a principal, is no bar to an indictment against him as an accessory after the fact, and *vice versa*. 4. Proof of the principal felony does not prove, or tend to prove, a party is guilty as an accessory after the fact. Opinion by SCOTT, J.—*Reynolds v. The People.*

CHANCERY PRACTICE—REFERRING ISSUE TO JURY—CONTINUANCE.—1. If there be error in the reference of a cause to a master to take evidence, as to the notice to be given, and he only reports the notes and deed of trust, and the decree is entered upon them, regardless of the report, the decree will not be reversed, as the error worked no harm. 2. A notice in a chancery suit to foreclose a mortgage, to submit a question of fact, as the insanity of the mortgagor, to a jury, upon such allegation in an unsworn answer, without any affidavit of the fact, is properly refused. An affidavit is necessary to entitle a party to have an issue so tried. 3. An application for the continuance of a suit in chancery, when the cause is set for hearing, is properly overruled when the affidavit shows no diligence in preparing for the hearing. 4. A motion to postpone the hearing of a suit in chancery for a few days is addressed to the discretion of the chancellor, and its exercise will not be interfered with, unless the discretion has been abused. 5. A bill to foreclose a mortgage or deed of trust may be brought in the name of the real owner of the note secured. Opinion by CRAIG, J.—*Hahn v. Huber et al.*

COUNTY ORDER NEGOTIABLE UNDER STATUTE—ASSIGNMENT—INDORSEMENT WHEN NECESSARY—POSSESSION—PRESUMPTION—TROVER—NEGLIGENCE.—1. An order issued by a county on its treasurer, payable to a person therein named on a day certain, is a negotiable instrument under the statute, as much so as a promissory note. 2. A county bond or order for the payment of money, payable to bearer, is negotiable by delivery without being indorsed, and the legal title will pass the same as a blank bill by delivery. 3. A county bond or order payable to a person therein named, or bearer, can not be transferred so as to vest the legal title, except by indorsement of the payee; but the equitable title may pass by a sale and mere delivery. 4. Possession of a note, bond or bill, unattended by circumstances which, in a reasonable mind, ought to excite suspicion or distrust, or put a party on inquiry, is *prima facie* evidence of ownership in the holder, and a purchaser from such a holder will be protected until purchase is assailed by one who can establish a legal title to the instrument. 5. If a negotiable instrument is lost, and found, and put in the market, and purchased by one without notice of the facts, the holder of the legal title and owner, upon demand, may maintain trover for its value. 6. The equitable owner of a lost note or other negotiable paper, has no superior equities to those of an innocent purchaser for value in the market, and can not maintain any action against such purchaser. 7. When one of two innocent parties is to suffer loss, it must fall upon the one first in fault. If, therefore, the equitable owner of a note loses the same and it is found and put upon the market, and comes into the hands of an innocent and *bona fide* purchaser, the loss must fall upon the loser for his negligence in not taking proper care of the same. Opinion by CRAIG, J.—*Garvin v. Wiswell.*

CHANGE OF VENUE—APPLICATION IN VACATION—EVIDENCE OF LAYING OUT OF HIGHWAY.—1. When a petition for a change of venue states that knowledge of the existence of the cause stated came to the applicants within the last preceding ten days, and, on the hearing of the application, the party offered to prove, as an excuse for not applying to the judge at Chambers, that he was absent from the circuit and engaged in holding court in Chicago during the preceding ten days, which the court refused to hear, and denied the motion: *Held*, that the excuse was sufficient, and that the court erred in refusing the evidence. 2. It is not within the letter or spirit of the statute that a party desiring a change of venue shall be subject to the expense of following a judge, who may have left his circuit, for the purpose of obtaining such an order. 3. An instruction is erroneous which leaves it to the jury to determine whether a public highway was laid out, without calling their attention to the steps necessary to the laying out of the same. The question is a mixed one of law and fact, and not purely of fact. 4. The fact of a party signing a petition for a road, has no tendency to show where it was located with reference to a fence claimed to be an obstruction, nor to show that he dedicated land to the public to widen the road, when the proof shows he then did not own the same. 5. A party not having title to land can not dedicate any part of it to the public for a road, and proof that a person in building a fence left ground for such road, without proof of title in him to the land, is no evidence of a dedication. Opinion by SCHOLFIELD, J.—*Harding v. Town of Hale.*

NOTES.

TWO odd bequests in Cardinal Antonelli's will have caused comment—25 francs to the hospital of the Holy Ghost at Rome, and a similar sum to the Holy Places at Jerusalem. Louis Veuillot explains why these were made. In the Pontifical States it used to be the law that no will was valid unless it contained these two legacies, the minimum sum of each being 5 francs, or the testator had been asked to do so by the notary and had refused. So at Genoa a similar bequest had to be made to the Hospital of Pamma tone, and at Turin to that of St. Maurice at St. Lazarus, the object in all cases being to aid in the support of those institutions. Antonelli, dying at the Vatican, conformed to the old usage.

WE have concluded to start a fund for the purpose of procuring the assassination of those heartless readers of this paper who still keep writing letters to us explaining the error into which we fell in our issue of January 12th, in regard to the state of the law in this state, as to fencing railroad tracks. The few subscribers of this paper who are in arrears are notified that if their arrearages are forwarded *now*, they will be applied to the augmentation of this charitable fund. All subscriptions to this fund should be directed to B. DOZER, Esq., Room 308, Chamber of Commerce, St. Louis, in whose trusty hands the whole matter has been placed.

JUDGE DAVIS, the newly elected Senator from Illinois, is tall and powerfully built. His face is almost a typical Anglo-Saxon one. His features are not finely cut, nor is their expression intellectual; but they are harmonious, and there is a look of good humor, common sense, and careless, self-confident manhood in the whole countenance. He wears a narrow frill of gray whiskers around his face and under his chin, setting off his hale, ruddy complexion to advantage. He has an air of perfect fearlessness, befitting one never cowed or broken by sickness or defeat. All his movements are said to suggest Sanford E. Church, Chief Justice of New York, as he was in 1872, before sickness touched him. Some interesting anecdotes are connected with Judge Davis' judicial history. A well to do farmer was once convicted before him of having counterfeit United States notes in his possession, with the intention of passing them. Before pronouncing sentence, Judge Davis asked him if he had arranged his affairs in anticipation of his enforced absence from home. The farmer replied that the conviction was a surprise to him, and nothing was in order; but that he could settle his business in about ten days. No one was found to go on his bail bond, and the judge allowed him to depart on his own recognizance. The lawyers laughed at the idea of the farmer being fool enough to come back again; but Judge Davis insisted that he had not "taken to the tall timber." His judgment of human nature was confirmed; for the farmer appeared at the appointed time and received his sentence. A loyal Virginian once began a suit before him for a review of a procedure confiscating $100,000 in state bonds. Senator McDonald argued that, as the confiscation act made the procedure in the nature of an admiralty seizure, there could be no review. "Well," said the judge, "there may be no precedent, as you say, McDonald, for a review in an admiralty case; but when such a thing as this can happen, it is time there was a precedent, and I am going to make one."—[New York Tribune.